

Article

GUANTANAMO, *BOUMEDIENE*, AND JURISDICTION-STRIPPING: THE IMPERIAL PRESIDENT MEETS THE IMPERIAL COURT

Martin J. Katz*

INTRODUCTION

In *Boumediene v. Bush*,¹ the Supreme Court struck down a major pillar of President Bush's war on terror: the indefinite detention of terror suspects in Guantanamo Bay, Cuba. The Court held that even non-citizen prisoners held by the United States government on foreign soil could challenge their confinement by seeking a writ of habeas corpus in federal court, and that the procedures the government had provided for such challenges were not an adequate substitute for the writ.²

As a habeas corpus case, *Boumediene* may well be revolutionary.³ However, *Boumediene* is more than merely a habeas

* Interim Dean and Associate Professor of Law, University of Denver College of Law; Yale Law School, J.D. 1991; Harvard College, A.B. 1987. Thanks to Alan Chen, Laurence Claus, Richard Fallon, Scott Moss, and James Pfander, as well as to the Colorado Employment Law Faculty (Rachel Arnow-Richman, Roberta Corrada, Helen Norton, and Nantiya Ruan) for their comments on drafts. Any errors are my own. The author served as counsel in the jurisdiction-stripping case, *Painter v. Shalala*, 97 F.3d 1351 (10th Cir. 1996).

1. 128 S. Ct. 2229 (2008).

2. See *id.* at 2340.

3. See *id.* at 2293-94 (Scalia, J., dissenting) ("Today, for the first time in our Nation's history, the Court confers a constitutional right to habeas corpus on alien enemies detained abroad by our military forces in the course of an ongoing war."); see also Glenn Sulmasy, *The Supreme Court Made a Mistake in Boumediene*, U.S. NEWS, June 19, 2008.

The Supreme Court's 5-4 decision in *Boumediene v. Bush* last week justifiably sent shock waves through the legal community. The majority opinion, authored by the ever wandering Justice Anthony Kennedy, disregarded both centuries of precedent and the military deference doctrine and also intruded on what is

corpus case. This Article will argue that, at its core, *Boumediene* should be understood as a case about separation of powers. More specifically, it should be understood as a case about the Court's vision of separation of powers—a vision in which federal courts serve to keep the political branches within the bounds of the Constitution and, most importantly, in which the political branches cannot evade judicial review by manipulating jurisdiction. Hence, this Article will argue, the principles set out in *Boumediene* have significant implications for Congress's ability to restrict or eliminate the jurisdiction of the federal courts—a practice known as jurisdiction-stripping, which has been the subject of an intense, long-running debate among the giants of constitutional law.⁴

In *Boumediene*, the Court asserted a forceful view of judicial power that it has hesitated to assert since the Founding. The Court's newfound willingness to assert this power may be criticized as an exercise in judicial imperialism. But it also reflects a healthy inclination to counterbalance several recent, unprecedented assertions of power by the President, accompanied by apparent acquiescence from Congress.

This Article will first summarize the long-running debate over jurisdiction-stripping. It will then show how the principles articulated in *Boumediene* suggest at least a partial resolution of that debate. Next, it will show that the resolution suggested by *Boumediene* is not limited to habeas cases—cases involving detention; rather, *Boumediene* speaks to jurisdiction-stripping more generally. Finally, the Article will discuss the extraordinary significance of the fact that the Court has articulated these principles now, after avoiding doing so for centuries. It will conclude that this timing is neither coincidental nor the product of an opportunistic judicial power grab. Rather, *Boumediene* represents a timely restoration of a healthy balance of power.

clearly the province of the political branches. As a result of this case, Guantanamo Bay detainees now formally have more rights than do prisoners of war under the Geneva Conventions.

But see Daniel R. Williams, *Who Got Game? Boumediene v. Bush and the Judicial Gamesmanship of Enemy-Combatant Detention*, 43 NEW ENGL. L. REV. 1 (2008) (criticizing *Boumediene* as focused exclusively on process, rather than imposing substantive limitations on the government). Other commentators have focused on the globalist aspects of the case. See, e.g., David Cole, *Rights over Borders: Transnational Constitutionalism and Guantanamo Bay*, CATO S. CT. REV. 47 (2007/2008); Gerald L. Neuman, *The Extraterritorial Constitution after Boumediene v. Bush*, 82 S. CAL. L. REV. 259 (2009).

4. See *infra* note 13.

I. A VERY BRIEF PRIMER ON JURISDICTION-STRIPPING: THREE QUESTIONS—FEW ANSWERS

Ever since the Supreme Court declared that it had the power to review acts of Congress and the President for constitutionality more than 200 years ago,⁵ legal thinkers have wondered whether Congress could control this power by restricting the jurisdiction of the federal courts. The question has tended to come up most visibly in two contexts.⁶

First, in the wake of controversial federal court decisions, opponents have occasionally proposed laws to strip the federal courts of jurisdiction to hear the type of case that had been at issue (presumably with the idea that state courts will ignore or refuse to apply the controversial precedent).⁷ For example, after the Supreme Court decided *Roe v. Wade*, providing constitutional protection for a right to abortion, some legislators proposed legislation that would strip the federal courts of jurisdiction to hear those cases.⁸ Similar legislation has been proposed in

5. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

6. Actually, this issue also comes up in a third context: In administrative law statutes, which occasionally attempt to preclude judicial review of certain types of administrative actions. See, e.g., 42 U.S.C. § 1395w-4(i)(1) (precluding judicial review of agency's determination of Medicare "conversion factor"); *Painter v. Shalala*, 97 F.3d 1351 (10th Cir. 1996) (upholding that jurisdiction-stripping statute as constitutional). For a comprehensive study of the more recent occasions on which Congress has curtailed federal court jurisdiction, see Benjamin Keele, *Ganging Up Against the Courts: Congressional Curtailment of Judicial Review, 1988-2004*, 7 PI SIGMA ALPHA UNDERGRADUATE J. POL. 174 (2007); see also Helen L. Norton, *Reshaping Federal Jurisdiction: Congress's Latest Challenge to Judicial Review*, 41 WAKE FOREST L. REV. 1003 (2006) (cataloguing and analyzing recent jurisdiction-stripping bills).

7. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 152 (3d ed. 2006); James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 N.W. U. L. REV. 191, 193-94 (2007) (discussing modern jurisdiction-stripping proposals and suggesting that they represent "something of a watershed" in the level of antagonism expressed by Congress toward the courts). There is, of course, an irony in the use of jurisdiction-stripping as a method of dealing with unpopular court decisions: Even if Congress successfully removed jurisdiction from some or all courts, the unpopular decision would remain on the books—the law of the land. However, the point of this type of jurisdiction-stripping can be seen either (1) as an attempt to limit the damage done by the unpopular decision by precluding other courts from applying that precedent to new cases, or (2) as an invitation to state courts or the political branches to ignore that precedent by removing the possibility that their decisions would be reviewed. In fact, one recent proposal (which did not become law) went so far as to provide that any decision by a federal court covered by its jurisdiction-stripping provision would "not [be] binding precedent on any state court." See Constitutional Restoration Act of 2005, S. 520, 109th Cong., § 301 (2005).

8. See, e.g., S. 158, 97th Cong. (1981); H.R. 867, 97th Cong. (1981) (proposed bills restricting federal jurisdiction in abortion cases). There have even been calls for stripping the federal courts of jurisdiction to hear abortion cases in the academy. See, e.g., Jason S. Greenwood, Comment, *Congressional Control of Federal Court Jurisdiction: The Case Study of Abortion*, 54 S.C. L. REV. 1069 (2003).

response to decisions on school busing, loyalty oaths, school prayer, reapportionment, and the pledge of allegiance.⁹ Notably, in this context, while the constitutionality of such legislation has been hotly debated, such legislation has rarely if ever been passed—perhaps as a result of Congressional doubt regarding the constitutionality, or at least the wisdom, of such legislation.¹⁰

A second context in which jurisdiction-stripping has been proposed—and actually passed—is during times of armed conflict. During such times, Congress has occasionally attempted to restrict federal court jurisdiction as a way to maximize the President's ability to wage war—for example, permitting him to detain those seen as an impediment to the war effort.¹¹ It was a statute such as this that was at issue in *Boumediene*. In the Detainee Treatment Act of 2004 and Military Commission Act of 2006,¹² Congress (1) created a non-judicial procedure for determining whether certain individuals are “enemy combatants,” and thus subject to detention, and (2) limited the ability of the federal courts to review such determinations.

Generally, when Congress has passed, or even proposed, jurisdiction-stripping legislation, it has spawned debate over whether such legislation is or would be constitutional. This debate has engaged the minds of many of the country's finest constitutional scholars.¹³

9. See, e.g., Pledge Protection Act of 2005, H.R. 2389, 109th Cong. (2005) (pledge of allegiance); S. 481, 97th Cong.; H.R. 4756, 97th Cong. (1981) (school prayer); Student Transportation Moratorium Act of 1972, S. 3388, 92d Cong.; H.R. 13916, 92d Cong. (1972) (school busing); Equal Educational Opportunities Act of 1972, S. 3395, 92d Cong.; H.R. 13915, 92d Cong. (1972) (school busing); H.R. 11926, 88th Cong. (1964) (reapportionment); S. 3386, 85th Cong. (1958) (loyalty oaths); see also Scott Moss, *An Appeal by Any Other Name: Congress's Empty Victory Over Habeas Rights*, 32 HARV. C.R.-C.L. L. REV. 249, 249 (1997) (noting that Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214, 1217-26 (codified in scattered sections of 28 U.S.C. and 21 U.S.C.) (1996), was a jurisdiction-restrictive response to court's perceived mollycoddling of convicted killers).

10. See RICHARD H. FALLON, JR., ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 322 (5th ed. 2003) (“At least since the 1930s, no bill that has been interpreted to withdraw all federal court jurisdiction with respect to a particular substantive area has become law.”) (citation omitted) [hereinafter HART & WECHSLER].

11. See, e.g., Military Commissions Act of 2006, 28 U.S.C. § 2241(e) (2006) (limiting federal court jurisdiction to hear claims by enemy combatants); *Ex Parte McCordle*, 74 U.S. (7 Wall.) 506 (1869) (upholding law striking down one basis for Supreme Court jurisdiction).

12. 28 U.S.C. § 2241(e) (2006).

13. See HART & WECHSLER, *supra* note 10, at 322 (“[D]ebates about the constitutionality of legislation withdrawing federal jurisdiction as a signal of substantive disagreement have spawned a body of literature that has been described as ‘choking on redundancy.’”) (citation omitted); Moss, *supra* note 9, at 250 (referring to jurisdiction-

It is beyond the scope of this Article to revisit the debates of these constitutional scholars. My purpose here is not to weigh in on the question of how courts should address jurisdiction-stripping statutes (though this Article does implicate that issue). Rather, my purpose here is to address how the Supreme Court—after centuries of largely avoiding the debate—has now suggested answers to certain fundamental questions in that debate. Accordingly, this Part will identify some of the fundamental questions in that debate.

The primary question is when, if ever, Congress can strip jurisdiction from the federal courts. However, for Congress to be able to do this, it would need to exercise two distinct powers: (1) the power to strip jurisdiction from the lower federal courts, and (2) the power to strip appellate jurisdiction from the Supreme Court. So this section will begin by examining both of those powers before examining whether Congress can combine those powers in order to preclude all federal court jurisdiction.¹⁴

stripping debate as “a cottage industry”). While the debate may be thick, it includes important articles by many of the “greats” of modern constitutional law. See, e.g., Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985); Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030 (1982); Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002 (2007); Laurence Claus, *The One Court that Congress Cannot Take Away: Singularity, Supremacy, and Article III*, 96 GEO. L.J. 59 (2007); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984); Theodore Eisenberg, *Constitutional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974); Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309 (1993); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569 (1990); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643 (2004); Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960); Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900 (1982); Ronald D. Rotunda, *Congressional Power to Restrict the Jurisdiction of the Lower Federal Courts and the Problem of School Busing*, 64 GEO. L.J. 839 (1976); Lawrence Gene Sager, *Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of Federal Courts*, 95 HARV. L. REV. 17 (1981); Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129 (1981); William W. Van Alstyne, *A Critical Guide to Ex Parte McCordle*, 15 ARIZ. L. REV. 229 (1973); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001 (1965).

14. See HART & WECHSLER, *supra* note 10, at 330 (listing these issues). Hart & Wechsler also list three additional issues: (1) jurisdiction-stripping statutes that leave state courts available to hear cases (an issue I discuss below, see *infra* notes 103-107 and

This Part will also show how the Court has gone to great lengths to avoid providing definitive answers to these questions (particularly to the question of the ability of Congress to preclude all federal court jurisdiction).

A. STRIPPING JURISDICTION FROM LOWER FEDERAL COURTS

The first question in the jurisdiction-stripping debate is whether Congress can restrict the jurisdiction of the lower federal courts (district courts and circuit courts) to hear a particular type of case. This question assumes that only the lower federal courts are closed—that the Supreme Court's original and appellate jurisdiction remains intact.¹⁵

Proponents of allowing this form of jurisdiction-stripping point to the text of Article III, which gives Congress the power to "ordain and establish" lower federal courts.¹⁶ The argument is that (1) the Ordain and Establish Clause gave Congress discretion over whether to create lower federal courts, and (2) if Congress could decline to create lower federal courts, then Congress can limit such courts' jurisdiction.¹⁷

Most commentators today seem to accept the basic idea that the Ordain and Establish Clause permits Congress to restrict or even eliminate the jurisdiction of the lower federal courts.¹⁸

accompanying text). (2) jurisdiction-stripping statutes that leave Article I administrative courts to hear cases (an issue I discuss below, *see infra* note 107), and (3) statutes which apportion jurisdiction among federal courts (an issue that is not implicated by *Boumediene*, which I therefore do not address). *See id.* Nor do I address the possibility of Congress attempting to preclude the Supreme Court's original jurisdiction. There would seem to be no textual basis for such an action and, perhaps for that reason, no one appears to have suggested such a possibility.

15. Much of the commentary regarding stripping lower federal court jurisdiction also assumes the availability of state courts to hear cases, possibly with appellate review by the U.S. Supreme court. *See, e.g.,* HART & WECHSLER, *supra* note 10, at 342–34; Hart, *supra* note 13; Meltzer, *supra* note 13, at 1627; Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 N.W. L. Rev. 143, 157 (1982). The importance of this assumption will be discussed below. *See infra* notes 105–107 and accompanying text.

16. *See* U.S. CONST. art. III, § 1 (vesting judicial power in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish").

17. *See* Bator, *supra* note 13, at 1030 (explaining argument). As Professor Bator noted, it is not just the "ordain and establish" clause that supports this argument. The argument is also supported by the Madisonian Compromise, which is reflected in that clause—that is, the idea that Congress would have the power to decide whether or not to create lower federal courts. *See id.*

18. *See, e.g., id.* at 1030; Charles E. Rice, *Congress and the Supreme Court's Jurisdiction*, 27 VILL. L. REV. 959, 960–62 (1982) (arguing that Congress has discretion to curtail lower court jurisdiction based on the Ordain and Establish Clause); *see also* Gunther, *supra* note 13, at 912 (noting the difficulty of refuting the "ordain and establish" argument and also noting that the argument is "widely supported" by commentators). *But see*

Some of these commentators have also suggested that there might be limits on this power. For example, nearly all commentators have suggested that the “ordain and establish” power is limited by substantive provisions elsewhere in the Constitution, such as the Equal Protection Clause; so Congress could not, for example, preclude jurisdiction only over cases brought by African Americans or Catholics.¹⁹ Also, as noted above, most of the commentators who believe Congress has the power to limit lower federal court jurisdiction assume that some alternative court would remain open to hear the cases in question—an assumption which is likely incorrect in a case like *Boumediene*.²⁰ But subject to these two potential limits,²¹ the “traditional view” is that Congress can exercise its “ordain and establish” power to close lower federal courts.²²

The courts, too,²³ seem largely to accept the “traditional view”—that Congress has the power to restrict lower federal court jurisdiction. The Supreme Court has, on at least five occasions, suggested that Congress can limit lower federal court jurisdiction pursuant to the Ordain and Establish Clause.²⁴ However, none of these cases appears to have tested the potential

Eisenberg, *supra* note 13 (arguing that, in modern times, Congress could not decline to establish lower federal courts); Gordon G. Young, *A Critical Reassessment of the Case Law Bearing on Congress's Power to Restrict the Jurisdiction of the Lower Federal Courts*, 54 MD. L. REV. 132, 137 (1995) (arguing that precedents do not support, and may even limit, the traditional view of Congress's “ordain and establish” power).

19. See, e.g., Bator, *supra* note 13, at 1034; Gunther, *supra* note 13, at 916–22; see also *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (observing that the Fifth Amendment's Due Process Clause contains an Equal Protection component, applicable against the federal government); Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 N.W. U. L. REV. 1, 6 n.27 (1990) (finding nearly universal agreement as to the invalidity of jurisdictional exclusion of cases brought by members of traditionally suspect classes):

20. See *supra* note 15. In Section I.C., I will address what happens when no other federal court is left open. I will address the role of state courts in Section II.B.1.b.

21. At least one commentator has suggested a third potential limit on the “ordain and establish” power. See, e.g., Tribe, *supra* note 13, at 142–43 (arguing that it would be problematic for Congress to use its “ordain and establish” power selectively—i.e., to disfavor certain rights—even when other courts might remain available). This idea seems to have gained more traction in discussions about Congressional power to strip all federal jurisdiction. See *infra* note 41.

22. See Young, *supra* note 18, at 137 (referring to expansive view of “ordain and establish” power as the “traditional view”).

23. I discuss the commentators' view before the courts' view because the former are far more numerous and detailed. As I note in the text below, one of the important aspects of jurisdiction-stripping jurisprudence is its paucity. See *infra* notes 48–52 and accompanying text; see also note 25 and text following note 35.

24. See, e.g., *Yakus v. United States*, 321 U.S. 414 (1944); *Lockerty v. Phillips*, 319 U.S. 182 (1943); *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323 (1938); *Kline v. Burke Constr. Co.*, 260 U.S. 226 (1922); *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850).

limits on the exercise of this power.²⁵ As I will discuss below, *Boumediene* suggests such a limit.²⁶

B. STRIPPING THE SUPREME COURT'S APPELLATE JURISDICTION

The second question in the jurisdiction-stripping debate is whether Congress can strip the Supreme Court of its appellate jurisdiction. This question assumes that the lower federal courts, as well as the Supreme Court's original jurisdiction, remain open.²⁷

The idea that Congress can strip the Supreme Court of its appellate jurisdiction flows primarily from the text of Article III, which gives Congress the power to make "Exceptions, and . . . Regulations" to the Supreme Court's appellate jurisdiction.²⁸ At least some commentators have gone beyond this simple textual argument to suggest a structural purpose underlying this textual provision: that the Framers included this language to provide

25. Most of those cases involved statutes that channeled jurisdiction to a particular lower federal court, rather than statutes that stripped jurisdiction from all lower federal courts. *See, e.g.,* *Yakus v. United States*, 321 U.S. 414 (1944) (upholding requirement that appeals in price control cases be filed in designated emergency court of appeals); *Lockerty v. Phillips*, 319 U.S. 182 (1943) (same). Others of these cases involved a limitation on remedies, rather than a limit on lower courts' ability to hear cases. *See, e.g.,* *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323 (1938) (upholding limit on lower courts' ability to issue injunctions); *Kline v. Burke Construction Co.*, 260 U.S. 226 (1922) (same). And others involved limits on lower federal courts' ability to hear state common law claims, as opposed to federal statutory or constitutional claims. *See, e.g.,* *Kline v. Burke Constr. Co.*, 260 U.S. 226 (1922) (upholding limit on lower federal courts' ability to issue injunctions against state courts in common law contract claims); *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850) (upholding limit on lower federal courts to hear diversity suits where diversity was created by assignment of a contract). So none of these cases tested whether there is a limit on Congress's ability to strip lower federal court jurisdiction where no state court remains available to hear the case. *See generally* Young, *supra* note 18 (questioning whether any of these precedents support a broad Congressional power to strip lower federal court jurisdiction).

26. *See infra* Section II.B.2. (arguing that *Boumediene* limits Congress's power to close lower federal courts to cases where a competent factfinder remains available); Section II.C.2. (arguing that this principle applies in all constitutional cases that are fact-dependent).

27. Some commentators in this debate assume that state courts would remain open, as well. *See e.g.* Hart, *supra* note 13 (elaborating on the need for state court uniformity in approaches to federal law); Ratner, *supra* note 13, at 201–02 (explaining need for Supreme Court to keep state courts in check and unify their positions on federal law). The importance of this assumption will be discussed below. *See infra* notes 105–107 and accompanying text.

28. U.S. CONST. art. III, § 2 ("In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.").

Congress with a means to check the power of the Supreme Court.²⁹

Most commentators accept the idea that the Exceptions Clause permits Congress to exercise such control over the Supreme Court's appellate jurisdiction.³⁰ However, some notable commentators have suggested that there might be some limits on this power. For example, Professor Hart argued that Congress cannot use this power to destroy the "essential functions" of the Supreme Court, which include maintaining the supremacy and uniformity of federal law.³¹ Others have suggested that, at least in certain types of cases, Congress cannot use its Exceptions Clause power in a way that would foreclose all avenues to the Supreme Court.³²

As with the issue of lower court jurisdiction-stripping, the Supreme Court has only occasionally weighed in on the issue of Supreme Court appellate jurisdiction-stripping.³³ The Court has said several times that Congress can use its Exceptions Clause

29. See, e.g., Wechsler *supra* note 13, at 1005–06.

30. See generally Bator, *supra* note 13; Gunther, *supra* note 13; Van Alstyne, *supra* note 13; Wechsler *supra* note 13, at 1005–06. A few commentators have rejected the argument, suggesting that the "regulations and exceptions" language was intended to modify the phrase "findings of fact"—that is, that Congress's power is limited to regulating the Court's review of findings of fact. See, e.g., RAOUL BERGER, CONGRESS V. THE SUPREME COURT 285–96 (1969); Henry J. Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53 (1962). But see HART & WECHSLER, *supra* note 10, at 337 n.11 ("[T]his revisionist view [advanced by Professors Berger and Merry] has attracted little support."). More recently, the idea that the power to make "exceptions" means a power to strip jurisdiction has been challenged by textualists, who argue that this language is best understood merely as permitting Congress to move certain issues between the Court's original and appellate jurisdiction. See, e.g., Calabresi & Lawson, *supra* note 13, at 1008; Claus, *supra* note 13, at 114. See also James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1441–42 (2000) (arguing that "exceptions" power might give Congress power to preclude the Court from hearing as-of-right cases, but it does not give Congress power to preclude the Court's supervisory powers, which are generally issued through discretionary writs, such as habeas corpus and mandamus).

31. See generally Hart, *supra* note 13 (arguing that Congress must leave intact the "essential functions" of the Court); Ratner, *supra* note 13, at 201–02 (explaining that "essential functions" include "maintaining the uniformity and supremacy of federal law"). But see Gunther, *supra* note 13, at 920 (noting that the "essential functions" argument begs the question of what are the Court's "essential functions" and confuses the familiar with the necessary); Wechsler, *supra* note 13, at 1005–06 (rejecting "essential functions" argument).

32. See generally Richard H. Fallon, Jr., *Applying the Suspension Clause to Immigration Cases*, 90 COLUM. L. REV. 1068 (1998); Ratner, *supra* note 13; Sager, *supra* note 13; Tribe, *supra* note 13. Although these commentators have spoken of the need to maintain a route to the Supreme Court, it may be that it would be sufficient to leave some federal court open. See *infra* Section II.B.1.b.

33. Again, I discuss the Court's response after that of the commentators because of the paucity of guidance from the Court. See *supra* note 23.

power to restrict the Court's appellate jurisdiction.³⁴ However, in repeated dicta, the Court appears to have endorsed one limit on this power: Congress may need to leave open some avenue by which certain types of cases can be litigated in federal court (and possibly the Supreme Court).³⁵ But the Court never actually struck down a law limiting its appellate jurisdiction on these grounds—until *Boumediene*.

C. STRIPPING ALL FEDERAL JURISDICTION

The most difficult question in the jurisdiction-stripping debate is whether Congress can preclude all federal court jurisdiction (other than the Supreme Court's narrow original jurisdiction). Put differently, assuming that Congress can eliminate the jurisdiction of the lower federal courts and the appellate jurisdiction of the Supreme Court, under what circumstances, if any, can Congress do both of these things at the same time?³⁶

The support for this form of jurisdiction-stripping derives from the fact that, assuming Congress can eliminate lower court jurisdiction and Supreme Court appellate jurisdiction, nothing in the text of the Constitution seems to preclude Congress from doing both of these things at once.³⁷ This form of jurisdiction-

34. See, e.g., *Felker v. Turpin*, 518 U.S. 651 (1996) (maintaining the limit on the Court's appellate jurisdiction on the basis of the Exceptions Clause); *Ex Parte McCordle*, 74 U.S. (7 Wall.) 506, 513–14 (1869) (upholding statute that limited Court's appellate jurisdiction on basis of Exceptions Clause).

35. See, e.g., *id.* at 515 (noting that jurisdiction-stripping statute may have been more problematic if it had foreclosed all routes to the Court); *Felker*, at 651 (reaching the same conclusion as the court in *McCordle*). At least one Justice also appears to have provided a nod in dicta to Professor Hart's "essential function" limit. In a concurrence in *Felker*, Justice Souter noted that it was an "open" question whether Congress could use its Exceptions Clause power to shut down all avenues to the Court, specifically citing Professor Hart's articulation of an "'essential functions' limitation on the Exceptions Clause." See *id.* at 667 (Souter, J., concurring). But the Court as a whole has never addressed this issue.

36. Most of the commentators in this debate have assumed that, even if Congress closed all federal courts, state courts would remain open. See, e.g., Meltzer, *supra* note 13, at 1627 (introducing the idea that state courts must hear cases if federal jurisdictions are stripped of their power to do so); Martin H. Reddish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of the Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45 (1975) (explaining that Congress cannot close all federal courts unless state court is available); Redish, *supra* note 15, at 155 (arguing in favor of Congressional power to strip all federal jurisdiction assumes state courts or some other independent body available to hear cases); see also Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 2039 (1991) (elaborating that "some court" must remain available). The implications of this assumption will be discussed below. See *infra* notes 104–107 and accompanying text.

37. Notably, the modern textual argument against total federal jurisdiction-

stripping may also find support in a checks-and-balances concept: The argument is that the Framers consciously provided these forms of power to Congress as a way to permit it to check the judiciary.³⁸

Here, the commentators seem to be more split than on the prior two questions. Some have argued that Congress can preclude all federal jurisdiction with few, if any, limits.³⁹ Others have rejected this position, arguing that Congress must vest jurisdiction in some federal court.⁴⁰

Still others have taken the position that Congress can curtail federal court jurisdiction, but subject to significant limitations. For example, Professors Sager and Claus have suggested that Congress cannot selectively strip jurisdiction in a manner that disfavors particular rights.⁴¹ Professor Amar has suggested that Congress cannot preclude federal courts from hearing matters that fall within the list of "cases" set out in Article III.⁴²

stripping attacks one of the two powers—the idea that the "exceptions" power permits Congress to preclude Supreme Court appellate jurisdiction. *See, e.g.,* Calabresi & Lawson, *supra* note 13, at 1008; Claus, *supra* note 13, at 114. This argument is not an argument against combining powers. Rather, it is an argument that one of the two purported powers does not exist.

38. *See, e.g.,* Charles Black, *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841, 846 (1975) (congressional control of federal court jurisdiction "is the rock on which rests the legitimacy of the judicial work in a democracy"). *But see* Claus, *supra* note 13, at 87–88 (disagreeing with Professor Black) and 88–97 (offering different account of framers' intent); Sager, *supra* note 13, at 38 (noting that this approach "is at odds with the position that Congress cannot use jurisdiction to undermine the decisions of the Supreme Court").

39. *See, e.g.,* William R. Casto, *The First Congress's Understanding of Its Authority over the Federal Courts' Jurisdiction*, 26 B.C. L. REV. 1101 (1985); Meltzer, *supra* note 13, at 1627; Redish, *supra* note 15, at 155; *see also* Pfander, *supra* note 7, at 195–96 (suggesting that "recent scholarship . . . points to an emerging orthodox consensus" that "Congress has relatively broad power over" federal courts' jurisdiction). I say "with few, if any, limits" because, as will be discussed below, almost all of these commentators assume that state courts would remain available to hear cases and might feel differently about Congress closing all federal courts if state courts were unavailable. *See supra* note 36. I will discuss this assumption below. *See infra* notes 104–107 and accompanying text.

40. *See, e.g.,* JULIUS GOEBEL, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801* 240–47 (1971); Clinton, *supra* note 13, at 749–50; Eisenberg, *supra* note 13. This position actually seems to have originated in dicta by Justice Story. *See infra* note 48.

41. *See, e.g.,* Claus, *supra* note 13 at 67 (arguing that, at the very least, Congress must not engage in issue-specific jurisdiction-stripping); Sager, *supra* note 13, at 70 (Congress cannot exercise its jurisdiction-stripping power in a way that disfavors particular constitutional rights); *see also* Tribe, *supra* note 13 (decrying jurisdictional gerrymandering of lower court jurisdiction). *But see* Redish, *supra* note 15, at 143 (issue-specific jurisdiction-stripping is permissible).

42. *See generally* Amar, *supra* note 13. *But see* Meltzer, *supra* note 13, at 1627 (disagreeing with Professor Amar on this point).

Most important for purposes of this Article is a limit proposed by Professor Sager, and also by Professors Fallon and Meltzer: Congress cannot preclude federal courts from hearing constitutional claims.⁴³ Varying justifications have been offered for this proposition. For example, some commentators have grounded this limit in the Due Process Clause.⁴⁴ Professor Sager bases this proposition on what he terms "the constitutional commitment to a radically independent federal judiciary," which he finds in Article III's salary and tenure protections for federal judges.⁴⁵ But the most important justification for this limit for purposes of understanding *Boumediene* is the one offered by Professors Fallon and Meltzer: Courts must remain available to adjudicate constitutional claims in order to "keep government generally within the bounds of law."⁴⁶

The courts⁴⁷ have seemed particularly hesitant to decide whether Congress can strip all federal courts of jurisdiction—at least until *Boumediene*.⁴⁸ They have adopted and applied a

43. See, e.g., Fallon & Meltzer, *supra* note 36, at 1778–79; Sager, *supra* note 13, at 66. But see Redish, *supra* note 15, at 155 (disagreeing that Congress must provide a federal court to resolve constitutional claims) (emphasis added). The possibility a state court could serve this purpose will be discussed below. See *infra* notes 104–107 and accompanying text.

44. See, e.g., Redish, *supra* 15, at 158–59 (explaining that the Due Process clause requires that court be available to hear all claims involving deprivations of life, liberty, or property). But see *id.* at 155 (that court need not be a federal court; it could be a state court). Notably, the Due Process argument would protect jurisdiction over only a subset of constitutional claims: those involving life, liberty, or property. Unless "liberty" were seen as co-extensive with all constitutional rights, this theory would not require federal jurisdiction over all constitutional claims. See CHEMERINSKY, *supra* note 7, at 503 (explaining that most, but not all, of the Bill of Rights have been considered "liberty" interests for purposes of incorporating them against states). A more modest variation on the principle that Congress must leave open a federal court in all constitutional cases or all Due Process Clause cases is the idea that a federal court must remain available to hear claims of a constitutional right to process. See Hart, *supra* note 13, at 1372.

45. See, e.g., Sager, *supra* note 13, at 65.

46. See Fallon & Meltzer, *supra* note 43, at 1778–79; see also Claus, *supra* note 13, at 64 (noting separation of powers issues inherent in an expansive reading of the Exceptions Clause). I say that this is the most important argument for our purposes because, as we will see below, it seems to be the argument that animated the *Boumediene* court. See *infra* Part II.B. As Professor Redish has pointed out, this "keeping the government in check" argument is not necessarily limited to constitutional claims; it might apply to non-constitutional claims, as well. See Redish, *supra* note 15, at 148, 152. Professor Redish's observation in this regard will be explored further below, in note 102.

47. Once again, I discuss the courts' position last because of the paucity of judicial guidance in this area. See *supra* note 23.

48. Although the Supreme Court has not addressed the question, two circuit courts appear to have reached it, though the guidance these opinions provide is not entirely clear. First, in *Battaglia v. General Motors Corp.*, the Second Circuit adopted the position that the Due Process Clause precludes stripping all federal jurisdiction in cases that involve the deprivation of property. See 169 F.2d 254, 257 (2d Cir. 1948). It is notable that

strong avoidance doctrine, under which they have interpreted statutes so as to avoid concluding that Congress has sought to strip federal courts of all jurisdiction (thus avoiding the constitutional question of whether Congress can do so). In fact, in a number of cases, the Supreme Court appears to go to great—some might say extreme—lengths to find that Congress did not intend to preclude all federal jurisdiction.⁴⁹ For example, in *INS v. St. Cyr*, the Court addressed a statute that said, “Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal” of a deportable alien.⁵⁰ Yet the court held that the words “judicial review” did not include habeas corpus; that habeas review remained available.⁵¹ In dissent, Justice Scalia accused the majority of finding “ambiguity in utterly clear” language and “fabricat[ing] a superclear state-

the Supreme Court never got involved in this case. But, as discussed below in the text, later Supreme Court dicta appears to endorse a variation of *Battaglia*'s holding: the idea that Congress cannot strip all jurisdiction in constitutional cases. Second, in *Eisentrager v. Forrestal*, the D.C. Circuit held that the Suspension Clause precludes stripping all federal jurisdiction in a habeas case. See 174 F.2d 961, 966 n.26 (D.C. Cir. 1949). However, this opinion was reversed on the ground that the Suspension Clause did not apply to German nationals held in Germany. See *Johnson v. Eisentrager* 339 U.S. 763 (1950) (a holding discussed at length and ultimately distinguished in *Boumediene*). So the Supreme Court did not address the issue in that case.

One Supreme Court Justice has addressed the issue, albeit in dicta. Justice Story asserted that Congress could not preclude all federal jurisdiction in any case listed in Article III, whether it involved a constitutional claim or non-constitutional claim. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 328–31 (1816). However, no later Supreme Court opinion appears to adopt—or even repeat—this assertion. (It was cited as an alternative ground by the D.C. Circuit in *Eisentrager*. See 174 F.2d at 966 n.26, *rev'd* 339 U.S. 763. But beyond that, Justice Story's assertion does not appear to have gained much traction in the courts.)

49. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (interpreting DTA as being non-retroactive, and thus permitting review in pending cases); *Rasul v. Bush*, 542 U.S. 466 (2004) (interpreting general habeas statute to permit habeas review of claims by aliens outside the United States); *INS v. St. Cyr*, 533 U.S. 289 (2001) (holding that, in precluding judicial review of immigration claims, Congress did not intend to preclude review of habeas jurisdiction); *Felker v. Turpin*, 518 U.S. 651, 661 (1996) (holding that Congress did not preclude all judicial review, since original habeas jurisdiction remained available); *Webster v. Doe*, 486 U.S. 592 (1988) (holding that Congressional preclusion of judicial review did not include preclusion of judicial review of constitutional claims); *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986) (articulating a similar holding to that in *Webster*); *Johnson v. Robison*, 415 U.S. 361, 366–67 (1974) (explaining that jurisdiction-stripping statute did not prevent judicial review of constitutional claims); see also Pfander, *supra* note 7, at 195 (noting that “the Court [has] adopted strained readings of restrictions on its appellate jurisdiction . . . to avoid the constitutional question that would arise from [such] legislation”); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549 (2000) (discussing Court's use of avoidance doctrines to resist jurisdiction-stripping).

50. 533 U.S. at 299.

51. See *id.* at 299–300.

ment, 'magic words' requirement . . . unparalleled in any other area of our jurisprudence."⁵²

I will discuss the merits of the Court's avoidance doctrine below.⁵³ But whatever one thinks of the merits of the Court's avoidance doctrine, there are two things that are worth noting about it. First, as a result of that doctrine, the Court has provided little solid guidance on the question of whether Congress can preclude all federal jurisdiction. Second, despite the lack of solid guidance, we do find some limited guidance in the Court's explanations for why it has worked so hard to avoid addressing this question. Specifically, the Court's has suggested some sympathy—in a vague way—for the position that there may be some limits on Congress's ability to strip all federal jurisdiction in constitutional cases.⁵⁴

The Court has repeatedly explained its inclination to avoid the question of jurisdiction-stripping in the form of a warning—albeit in dicta—to Congress: If Congress really did intend to preclude all jurisdiction over constitutional claims, the Court explains, this "would give rise to substantial constitutional questions."⁵⁵ In other words, the Court seems to be suggesting that, while it believes Congress has substantial control over federal jurisdiction, the Court might draw the line at total federal jurisdiction-stripping in constitutional cases.

So far, this warning has been relatively vague; the Court has not explained the "constitutional questions" that would arise from total federal jurisdiction-stripping in such cases. And so far,

52. See *id.* at 326–27 (Scalia, J., dissenting).

53. See *infra* Part III.

54. This vague warning might arguably represent the Court's attempt to open of a "dialogue" with Congress or with the people over the constitutional permissibility of jurisdiction-stripping. See Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 668–69 (1993) (discussing role of Court in focusing and promoting dialogue over constitutional meaning); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198 (1992) (explaining the judicial branch's dialogue with the other branches of government).

55. See *St. Cyr*, 533 U.S. at 300; see also Webster, 486 U.S. at 603 (justifying heightened intent requirement as means of avoiding the "'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim") (citation omitted); Bowen, 476 U.S. at 681 n.12 (choosing to avoid the "serious constitutional question"); Johnson, 415 U.S. at 366–67 (articulating that the Court must ascertain whether a construction of the statute is possible which avoids the constitutional question). The Court has also offered similar dicta outside of the context of its avoidance doctrine. See *Zadvydas v. Davis*, 533 U.S. 678, 692 (2001) ("This Court has suggested . . . that the Constitution may well preclude granting an administrative body the unreviewable authority to make determinations implicating fundamental rights") (citing *St. Cyr*, 533 U.S. 289).

the Court's endorsement has been limited to dicta. This all changed in *Boumediene*.

II. *BOUMEDIENE*'S ANSWERS

This Part will show how *Boumediene* suggests at least a partial resolution of the jurisdiction-stripping debate. Section A will explain the *Boumediene* opinion on its own terms—that is, as a case about the habeas rights of non-citizens held abroad. Section B will show how the Court's responses to the habeas issues before it suggest answers to the three questions in the jurisdiction-stripping debate. Section C will then show how these answers apply to all jurisdiction-stripping cases, not just to habeas cases.

A. *BOUMEDIENE* ON ITS OWN TERMS

On its face, *Boumediene* is a case about the habeas corpus rights of non-citizens detained abroad by the United States government. The case arose in the context of the war on terror. As part of that effort, the Bush Administration had captured and detained a number of individuals, claiming that they were “enemy combatants.” The President had claimed that he had the power to hold such “enemy combatants” for the duration of the war on terror—perhaps indefinitely.⁵⁶ Several of the detainees challenged this claim. Others, including the petitioners in *Boumediene*, claimed that the government made a factual error; that they were not “enemy combatants.” Several such challenges, including the one in *Boumediene*, were made by petitioning the federal courts for writs of habeas corpus; that is, for an order to release the petitioners on the ground that their detentions are illegal.

To deal with the possibility of habeas claims, the Bush Administration divided the detainees into two groups, depending on their citizenship status and location. This is because the detainees' right to seek habeas was thought to depend on these two criteria. U.S. citizens and those detained on U.S. soil are generally thought to have a right to seek habeas.⁵⁷ But the Administra-

56. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

57. While President Bush seemed to concede that Americans or those held on American soil had a right to habeas, he did not concede that the federal courts should hear their cases. Rather, the President claimed that Constitution gave him exclusive or nearly-exclusive power to decide how to prosecute an armed conflict, and that this executive power overrides or limits citizen-detainees' right to seek habeas relief from the courts—a claim that the Court rejected in 2004 in *Hamdi*. See 542 U.S. 507.

tion contended that non-citizens detained abroad did not have that right. Accordingly, the Administration had detained a number of non-citizens in Guantanamo Bay, Cuba, and claimed that the courts cannot entertain habeas petitions by these detainees.

The initial fight over the habeas rights of non-citizens held in Guantanamo was a statutory fight. In *Rasul v. Bush*, the Court held that non-citizens detained in Guantanamo Bay had a statutory right to seek habeas relief under the general habeas statute, 28 U.S.C. Section 2241.⁵⁸ Congress responded with the Detainee Treatment Act (DTA), which amended Section 2241 to preclude statutory habeas claims by non-citizens designated as “enemy combatants.”⁵⁹ In *Hamdan v. Rumsfeld*, the Court held that the DTA did not apply retroactively; that non-citizen detainees who had already filed habeas petitions under Section 2241 could continue to pursue those claims.⁶⁰ Once again, Congress responded, this time with the Military Commissions Act of 2006 (MCA), which made clear that the DTA was intended to be retroactive.⁶¹ This effectively precluded all avenues of statutory habeas jurisdiction for non-citizens held in Guantanamo.⁶²

In *Boumediene*, a group of non-citizen detainees in Guantanamo Bay claimed a constitutional right to habeas. The detainees claimed that, irrespective of any statute, the Suspension Clause of the Constitution—which precludes Congress from suspending the writ of habeas corpus except in cases of rebellion or invasion⁶³—provides them with a constitutional right to petition a court for a writ of habeas corpus.

The government’s first defense was that the Suspension Clause does not apply to non-citizens held outside of the U.S. in a place such as Guantanamo.⁶⁴ Specifically, the government ar-

58. See *Rasul v. Bush*, 542 U.S. 466 (2004).

59. See Detainee Treatment Act of 2005, 28 U.S.C. § 2241(e) (2006).

60. See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

61. 28 U.S.C. § 2241(e) (2006).

62. I say “effectively precluded” because, in *Boumediene*, the detainees tried to claim that the MCA’s retroactivity provisions were not intended to apply to habeas claims (a distinction similar to the one adopted by the Court in *St. Cyr*, see 533 U.S. at 299–300). However, in *Boumediene*, the Court swiftly rejected this claim. See *Boumediene*, at 2242–44.

63. See U.S. CONST. art. I, § 9. In this case, Congress did not try to suspend the writ. But see Jonathan Alter, *Keeping Order in the Courts*, NEWSWEEK, Dec. 10, 2001, at 48 (“When Attorney General John Ashcroft sent the secret first draft of the antiterrorism bill to Capitol Hill in October [2001], it contained a section explicitly titled: ‘Suspension of the Writ of Habeas Corpus.’”). For an interesting discussion of whether Congress could do so, see Amanda Tyler, *Suspension as an Emergency Power*, 118 Yale L.J. (forthcoming 2009).

64. See *Boumediene*, at 2244.

gued (1) that the lease agreement between the U.S. and Cuba regarding the Guantanamo Bay Naval Station makes Cuba sovereign over that location, and (2) that the Suspension Clause does not apply in places where another country maintains sovereignty; a sovereignty-based test.⁶⁵ The Court accepted the government's first contention (that Cuba maintained sovereignty over Guantanamo).⁶⁶ But it rejected the government's second contention, holding for the first time that the Suspension Clause—and therefore a constitutional right to habeas—applies to certain non-citizens held abroad.⁶⁷ Specifically, it held that the Clause applied in Guantanamo.⁶⁸

The Court based this holding primarily on an argument about separation of powers.⁶⁹ The Court noted that the government's proposed sovereignty-based test would essentially permit the government to "switch the Constitution on or off at will" based on the agreements it might enter with host countries.⁷⁰ This, the Court held, would violate the concept of separation of powers: "The test for determining the scope of [the Suspension Clause] must not be subject to manipulation by those whose power it is designed to restrain."⁷¹ Rather, the Court held, the scope of the Suspension Clause must be determined by the courts: The courts, not the political branches, are supposed to say "what the law is."⁷²

Then, having rejected the government's proposed sovereignty-based test for determining the where the Suspension Clause applies, the Court looked at its precedents to derive an

65. *See id.* at 2252.

66. *See id.*

67. *See id.* at 2262. At least one commentator has argued that the constitutional right to habeas derives from Article III, not the Suspension Clause. *See Claus, supra* note 13, at 109–113. However, the *Boumediene* Court seemed to assume that the constitutional right to habeas was implied by the Suspension Clause. *See Boumediene*, 128 S. Ct. at 2262.

68. *See id.*

69. The Court's opinion also contains a lengthy examination of the history of habeas corpus both prior and subsequent to the Founding. *See id.* at 2244–51. However, at the end of this discussion, the Court concludes that this history is non-dispositive. *See id.* at 2249, 2251. Notably, what the Court does glean from this discussion is the notion that, as a historical matter, the writ has largely been understood as a mechanism for separating powers—a way for courts to check the excesses of the executive. *See id.* at 2246, 2247. Additionally, as discussed in the text below, the Court relied on precedent to frame its test for the places in which the Suspension Clause would apply to non-citizens. However, this discussion occurred only after the Court had rejected the government's proposed sovereignty-based test.

70. *See id.* at 2259.

71. *See id.*

72. *See id.*

alternative test.⁷³ In applying that test, the Court concluded that Guantanamo was the type of place in which the Suspension Clause applied.⁷⁴

The government also advanced the alternative argument that, even if the Suspension Clause did apply to non-citizens at Guantanamo, the procedures provided by the DTA serve as an adequate substitute for the writ.⁷⁵ The DTA provides two stages of review: First, a detainee gets a hearing in front of a Combatant Status Review Tribunal (CSRT), established by the Defense Department.⁷⁶ Then, the detainee can challenge the CSRT's determination in the U.S. Court of Appeals for the District of Columbia.⁷⁷

The Court held that this procedure did not provide an adequate substitute for habeas. It began by noting that "the necessary scope of habeas review [or a proposed substitute for habeas] in part depends upon the rigor of any earlier proceedings."⁷⁸ The Court then noted several shortcomings in the earlier CSRT procedures, including the fact that detainees do not have the assistance of counsel, have limited means to find and present evidence that they are not enemy combatants, and may not even be aware of the most critical allegations relied upon by the government.⁷⁹ The Court remarked that these shortcomings posed a "considerable risk of error," and held that "the court that conducts the habeas proceeding [or its substitute] must have the means to correct errors that occurred during the CSRT proceedings."⁸⁰ The Court then noted several limitations that the DTA places upon the D.C. Circuit's ability to correct such errors, including the court's inability to consider newly discovered evidence.⁸¹ As a result of these limitations, the Court held that the DTA did not provide an adequate substitute for habeas.⁸²

Because the Suspension Clause applied and because Congress had neither sought to suspend the writ nor provided an adequate substitute for the writ, the Court held in favor of the

73. *See id.* at 2259.

74. *See id.* at 2262.

75. *See id.* at 2262.

76. *See id.* at 2241.

77. *See* 28 U.S.C. § 2241(e) (2006).

78. *See Boumediene*, at 2268.

79. *See id.* at 2269.

80. *See id.* at 2270.

81. *See id.* at 2272.

82. *See id.* at 2274.

detainees. It ordered the lower courts to hear habeas cases brought by such detainees.⁸³

B. *BOUMEDIENE* AS A JURISDICTION-STRIPPING CASE

As discussed above, *Boumediene* was a habeas case. Though habeas-stripping may conceptually be understood as a subset of jurisdiction-stripping, the Court did not characterize the case as a jurisdiction-stripping case. Rather, the Court addressed the case as a habeas case. However, as this Section will demonstrate, the principles the Court used to decide *Boumediene* effectively provide answers to the jurisdiction-stripping debate.

This Section will show how *Boumediene* suggests a critical limit on Congress's power to curtail federal court jurisdiction: Congress cannot strip all jurisdiction over constitutional questions. The Section will then look at the two sub-powers that arguably give Congress the power to restrict federal court jurisdiction, the "ordain and establish" power to limit lower court jurisdiction and the "exceptions and regulations" power to limit Supreme Court appellate jurisdiction. The Section will show how *Boumediene* may limit those two sub-powers, in addition to limiting Congress's ability to exercise those powers simultaneously. Then, in the following Section, I will demonstrate that these limits are not limited to habeas cases; that they apply to all jurisdiction-stripping cases.

1. Preventing Stripping of All Federal Jurisdiction.

Perhaps the most significant development in *Boumediene* is that it effectively answers the question of whether Congress can strip jurisdiction from all federal courts. *Boumediene* effectively says that Congress cannot do so, at least in cases involving constitutional questions.⁸⁴

I am not claiming that the *Boumediene* majority necessarily saw itself as deciding this jurisdiction-stripping question. Rather, my point is that the *Boumediene* Court employed three powerful principles to decide whether the Suspension Clause extended to Guantanamo, and that those principles can be applied to—and largely resolve—the question of whether Congress can preclude all federal court jurisdiction.

83. See *id.* at 2279.

84. A caveat to this principle where state courts may be available will be discussed below. See *infra* notes 104–107 and accompanying text.

a. *Boumediene's* Three Principles.

Recall that the government had requested a sovereignty-based test to determine the reach of the Suspension Clause. And recall that the Court rejected that proposed test on the ground that the test would violate separation of powers principles. Specifically, *Boumediene's* separation of powers argument contained three principles.

First, the Court said that the political branches cannot set their own boundaries. The Court could not abide the prospect that “the political branches have the power to switch the Constitution on and off at will.”⁸⁵ In other words, someone other than those branches must define the limits of those branches’ power. This can be thought of as *the external limit principle*.⁸⁶

Second, the Court said that the Courts must be the ones to define the limits on the political branches’ power. The problem that the Court had with the prospect of the political branches having the ability to “switch the Constitution on or off” was that such power “would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say ‘what the law is.’”⁸⁷ In other words, the Court said, the courts, not the political branches, must define the Constitution’s limits on the political branches’ power—must say “what the law is.” This can be thought of as *the judicial enforcement principle*.

Finally, and perhaps most importantly for the jurisdiction-stripping debate, the Court balked at the idea that the political branches could manipulate the courts’ ability to perform this function: “The test for determining the scope of [the Suspension Clause] must not be subject to manipulation by those whose

85. See *Boumediene*, 128 S. Ct. at 2259.

86. See Claus, *supra* note 13, at 64, 119–20 (noting separation of powers problem with jurisdiction-stripping: “For three centuries, Western political thought has recognized the evil in letting any government actor conclusively determine the reach of its own powers.”).

87. See *Boumediene*, 128 S. Ct. at 2259 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

power it is designed to constrain.”⁸⁸ This can be thought of as *the anti-manipulation principle*.⁸⁹

Although *Boumediene* deployed these three principles to address a controversy over the territorial scope of the Suspension Clause, these three principles have important implications for the jurisdiction-stripping debate.

The first two principles (the external limit principle and the judicial enforcement principle) are powerful arguments for judicial review of the political branches’ acts. In fact, these principles were central to Chief Justice Marshall’s famous justification for judicial review in *Marbury v. Madison*—which *Boumediene* cites prominently.⁹⁰ If there were no judicial review, Marshall reasoned, then the political branches would effectively have unlimited power—contrary to the Constitution’s design.⁹¹ It is essentially an argument that (1) lack of oversight effectively means lack of constraint (the external limit principle), and (2) that the courts’ role is to provide that oversight (the judicial enforcement principle).

For example, suppose that the President were given the final decision on how much process the Due Process Clause required. He might decide that this clause required no process at all, or no process beyond the “right” to respond during interrogation.⁹² He could thereby detain people indefinitely without any hearing. Or suppose that Congress were given the final decision on the meaning of the Equal Protection Clause. Congress could

88. See *id.* This principle appears to have been suggested by a single Justice in 1950. See *Johnson v. Eisentrager*, 339 U.S. 763, 795 (1950) (Black, J., dissenting) (“The Court is fashioning wholly indefensible doctrine if it permits the executive branch, by deciding where its prisoners will be tried and imprisoned, to deprive all federal courts of their power to protect against a federal executive’s illegal incarcerations.”). But this principle does not seem to have been adopted by the Court until *Boumediene*.

89. Note that this principle is slightly different than the one suggested by Professors Sager, Tribe, and Claus, *supra* note 41. These commentators were concerned with Congress manipulating jurisdiction as a way to favor or disfavor particular rights. See, e.g., Sager, *supra* note 13, at 70 (contending that Congress cannot exercise its jurisdiction-stripping power in a way that disfavors particular constitutional rights); Tribe, *supra* note 13 (decrying jurisdictional gerrymandering); see also Claus, *supra* note 13 at 67 (arguing that, at the very least, Congress must not engage in issue-specific jurisdiction-stripping). *Boumediene*’s anti-manipulation principle seems broader. The concern is not that Congress may manipulate jurisdiction to favor or disfavor particular rights; it is that Congress may try to manipulate jurisdiction to evade review of its (or the President’s) conduct—irrespective of which right it might be infringing.

90. See *Boumediene*, 128 S. Ct. at 2259.

91. See *Marbury*, 5 U.S. (1 Cranch) at 177.

92. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 537 (2004) (highlighting the government’s argument that it provided process by permitting a prisoner to contest his status as an “enemy combatant” during interrogation).

decide that this clause only protected the slaves freed during the Civil War, and thereby pass laws denying modern-day African Americans or Catholics the right to own property. The correctness of these interpretations is not the issue. The issue is who gets to interpret the Constitution. The point of Marshall's argument, echoed in *Boumediene's* first two separation of powers principles, was that someone other than the political branches—specifically, the judiciary—must be the arbiter of the Constitution's limits on those branches.⁹³

While these two principles have traditionally been deployed in support of the power of judicial review, they also have implications for the jurisdiction-stripping debate. The argument is that these principles not only permit judicial review (as *Marbury* held), they require judicial review, at least in constitutional cases: If Congress could preclude judicial review, it would be able to shed the very constraints that *Marbury* said were necessary to keep the political branches in check. Thus, the argument goes, courts must remain available to adjudicate constitutional claims in order to “keep government generally within the bounds of law.”⁹⁴

Readers might balk at these two principles, whether applied to judicial review or jurisdiction-stripping. As most first year law students learn in their study of *Marbury*, despite Chief Justice Marshall's assertion, it is far from clear that absent judicial review the political branches would ignore the Constitution (the external limit principle). Those elected to the political branches take a similar oath to the one judges take to act within the bounds of the Constitution.⁹⁵ Whether they would keep themselves in check absent external oversight is arguably an open question.⁹⁶ Also, even if one accepted the external limit principle, it would seem to be an open question whether there are other effective forms of oversight besides judicial review (the judicial enforcement principle). For example, the electorate might vote a

93. Actually, *Marbury* did not necessarily establish that the courts must always get the last word regarding the constitutionality of the political branches' actions. Read narrowly, that opinion might be understood as standing only for the proposition that the courts get to evaluate constitutionality; not that they get the last word on the issue. See *Marbury*, 5 U.S. (1 Cranch) at 177. However, in later cases, the Court asserted that it gets the last word on constitutionality. See, e.g., *Cooper v. Aaron*, 358 U.S. 1 (1958).

94. See Fallon & Meltzer, *supra* note 43, at 1778–79.

95. See, e.g., U.S. CONST. art. II, § 1, cl. 8. But see Paul A. Diller, *When Congress Passes an Intentionally Unconstitutional Law: The Military Commissions Act Of 2006*, 61 SMU L. REV. 281 (2008) (arguing that Congress passed the MCA knowing that it was unconstitutional and would be struck down by the Court).

96. See CHEMERINSKY, *supra* note 7, at 44.

politician out of office for acting outside the bounds of the Constitution.⁹⁷ Maybe courts are not necessary to keep the political branches in check. And, of course, there is also the question of who will provide a check on the courts.⁹⁸

But my purpose here is not to debate whether these two principles—when made by the *Marbury* Court or the *Boumediene* Court—are correct. My point is that the *Boumediene* Court has adopted these two principles in a context that supports their application to the jurisdiction-stripping debate.

Prior to *Boumediene*, these principles had been applied to establish the power of judicial review. But they had never been deployed by the Court to address the power of Congress to curtail judicial review.⁹⁹ Although *Boumediene* was not on its face a jurisdiction-stripping case, the Court applied these principles in a way that had the effect of requiring jurisdiction in a case in which Congress had tried to restrict it. Congress had said that only the D.C. Circuit could hear the case and simultaneously limited the ability of that court to do so. Based on the two *Marbury* principles, the *Boumediene* Court held that Congress could not impose such a limit. *Boumediene*'s use of these two principles to ensure jurisdiction strengthens the argument that these principles preclude complete jurisdiction-stripping in constitutional cases.

But an additional argument against jurisdiction-stripping flows from *Boumediene*'s anti-manipulation principle (that the political branches may not manipulate the scope of the Constitution's limits on their own power). This principle, which the Court had not clearly articulated before,¹⁰⁰ suggests that Congress cannot strip jurisdiction where doing so serves to shield Congress or the President from judicial review in constitutional cases, giving

97. *See id.*

98. After *Marbury*, one possible answer to this question was that Congress could do so, through its jurisdiction-stripping power. *Boumediene* appears largely to foreclose this option without providing an alternative means of limiting the courts. Whether this is a good idea is discussed more fully below in Part III.

99. As noted above, the Court did occasionally talk about the "separation of powers" problems that might arise if Congress were to preclude all jurisdiction over constitutional claims. *See supra* Section I.C. However, as also noted above, the Court never discussed what those "separation of powers" problems were, and never struck down a jurisdiction-stripping or jurisdiction-restricting law based on these principles—until *Boumediene*. *See id.*

100. While it is far from clear, one might read *United States v. Klein* as standing for the proposition that Congress cannot manipulate federal court jurisdiction in a manner designed to achieve specific outcomes in litigation. *See* 80 U.S. (13 Wall.) 128 (1871).

the political branches the last word on the constitutionality of their own actions.¹⁰¹

To understand this point, consider again the hypotheticals set forth above. In those hypotheticals, the President asserted that the Due Process Clause did not preclude him from detaining people without trial, and Congress asserted that the Equal Protection Clause did not preclude it from preventing African Americans or Catholics from owning property. Exercising the power of judicial review, the courts would almost certainly reach different conclusions about the meaning of these two clauses. But now suppose that Congress passed a law stripping jurisdiction from the courts to hear cases involving the Due Process Clause or the Equal Protection Clause. Effectively, such a law would manipulate the limits on the political branches. It would permit those branches, and not the judiciary, to determine the Constitution's limits on their actions—that is, to “say what the law is.” *Boumediene*'s anti-manipulation principle seems to preclude such a tactic.

Thus, the three separation of powers principles deployed in *Boumediene* appear to resolve, at least in part, the question of complete jurisdiction-stripping. These three principles suggest that Congress cannot preclude all jurisdiction in constitutional cases.¹⁰²

101. Below, I will discuss the potential meanings of the anti-manipulation principle, as well as how this principle can be reconciled with *Ex Parte McCordle*'s famous pronouncement that Congress's intent is irrelevant in jurisdiction-stripping cases, 74 U.S. (7 Wall.) 506, 515 (1869). See *infra* text accompanying notes 112–117. For now, I state the principle generically.

102. One might wonder whether *Boumediene*'s requirement for a federal court to remain open applies only in constitutional cases, or whether a court must also be available to hear claims of statutory violations as well. See HART & WECHSLER, *supra* note 10, at 352 (posing question of whether constitution requires review over “suits alleging that official action has violated statutory, rather than constitutional, rights”); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 976–86 (1988) (advocating for the need of judicial review of legislative and administrative actions). If courts are required to keep the federal government within the bounds of its authority, this requirement would seem to apply to statutory, as well as constitutional authority. See Redish, *supra* note 15, at 148, 152. And this is a constitutional principle—the type that would arguably trump Congress's Article III jurisdiction-stripping powers. The Constitution requires the federal government to remain within its bounds. When it acts within the power granted by a legitimate statute, it acts within its bounds. When it exceeds such power, it acts outside of those bounds. Given the *Boumediene* Court's concern about unlimited government—and the need for courts to prevent unlimited government—it might well be concerned with action that exceeds statutory, as well as constitutional, bounds.

The separation of powers argument against jurisdiction-stripping in statutory cases is arguably hampered by the argument that many statutory claims do not really involve the unconstrained exercise of federal power. Specifically, when a statute provides an agency

b. Potential Limits on *Boumediene*'s Principles.

There are two—possibly three—important limits on my argument that *Boumediene* should be read as precluding complete jurisdiction-stripping in constitutional cases.¹⁰³ First, *Boumediene* does not necessarily preclude Congress from stripping all *federal* jurisdiction in constitutional cases—at least in cases where state courts (1) remain open, and (2) are capable of keeping the federal political branches in check.¹⁰⁴ Recall that *Boumediene*'s second principle (the judicial enforcement principle) requires a court to keep the political branches of the federal government in check. In *Boumediene*, which involved a habeas claim against the federal government, only a federal court could provide such a check. This is because, under *Tarble's Case*, a state court cannot grant habeas petitions against the federal government.¹⁰⁵ However, it remains possible that, in other types of cases, a state court might be capable of serving as a check against the federal politi-

with discretion to act within a certain range, it will be impossible to argue that the agency is acting in an unconstrained fashion as long as it is acting within the range of its discretion. But this is really just a way of saying that, in such a case, there is no statutory violation. That is, in such a case the agency would be acting within its power under the statute, as opposed to in violation of the statute. If the claim was that the agency exceeded the discretion provided by the statute, such a statutory claim would again raise the specter of unconstrained federal action.

103. I do not include in this discussion the possibility that my argument regarding the implications of *Boumediene*'s three principles might be limited to habeas claims. That argument is discussed—and rejected—below in Section II.C.

Nor do I consider seriously the possibility that *Boumediene* was concerned only with the geographic scope of constitutional limits (where the Constitution applies), as opposed to the doctrinal scope of those limits (what the Constitution means). This possibility would not give sufficient weight to all of the *Boumediene* Court's concerns. Although the Court was clearly concerned with whether the Constitution applied in Guantanamo, the reason for this concern was more substantive than geographic. The Court's point was that the political branches should not be allowed to define their own limits; that if they could, they would effectively be unrestrained. Yet the concern about lack of restraint is not just a geographic concern. It is hard to imagine that the Court would be concerned with an unrestrained exercise of power in Guantanamo, but not be concerned with such an unrestrained exercise of power in the U.S.

104. There has been a long-running debate about the role of state courts in the jurisdiction-stripping debate. Many proponents of jurisdiction-stripping have assumed that state courts would remain available, or even argued that it is the availability of state courts that permits Congress to strip jurisdiction from federal courts. See *supra* notes 15, 27, and 36.

A sub-part of this debate has included the question of whether state courts have the institutional competence or insulation to keep *state* governments within the bounds of the Constitution. See *supra* notes 39–43. However, *Boumediene* does not speak to that issue. It only addresses the need for courts to keep the *federal* government within the bounds of the Constitution.

105. See *In re Tarble* 80 U.S. (13 Wall.) 397 (1871). *Tarble* "has been much criticized." See HART & WECHSLER, *supra* note 10, at 356. But it also seems fairly well entrenched as precedent.

cal branches.¹⁰⁶ In such cases, *Boumediene*'s second principle would be satisfied by the existence of a state court. That is, if there are cases in which state courts could check the federal government, Congress could strip jurisdiction from all federal courts in such cases so long as it left state courts in place.¹⁰⁷

A second limitation on my argument is that it does not necessarily require a court to hear every constitutional case; it merely requires that the judiciary, as opposed to Congress, determine which constitutional cases do not need to be heard by a court. It is highly unlikely that *Boumediene* would require courts to hear all constitutional cases. Such a requirement would be monumental, overturning hundreds of years of precedent in which the Court has tolerated—in fact, sanctioned—the absence of judicial review in constitutional cases in certain areas. For example, the courts routinely demur to the political branches in cases involving “political questions” or other justiciability issues, in cases involving immunity, and in cases involving conduct in a “theater of war.”¹⁰⁸ Yet, the *Boumediene* Court seemed unconcerned about

106. The Madisonian compromise almost certainly envisioned the possibility that state courts might keep the federal government in check. The whole idea was that Congress might choose not create lower federal courts, instead leaving it to state courts (possibly with appellate review in the U.S. Supreme Court) to resolve constitutional claims. See Redish, *supra* note 15, at 155. However, subsequent developments appear to make this concept less likely. See, e.g., *M'Clung v. Sillman*, 19 U.S. (6 Wheat.) 598 (1821) (state courts cannot compel performance by federal officers). But see Sager, *supra* note 13, at 82 (suggesting that Congress can waive this principle to permit state courts to check the federal government, and might be required to do so in cases where it sought to preclude federal jurisdiction). In any event, the question of whether state courts could effectively check the federal government is beyond the scope of this Article. My point is only that if state courts could do so, then *Boumediene* would appear to permit Congress to strip jurisdiction from federal courts to hear constitutional claims if it left state courts open.

107. It is also arguable that a non-Article III federal court might suffice. See HART & WECHSLER, *supra* note 10, at 362–418 (discussing role of non-Article III federal courts). However, given the *Boumediene* Court's insistence on disinterest and independence, see 128 S. Ct. at 2269, it would likely be quite skeptical of an organ of the political branches serving as the only check on the political branches. See also *Zadvydas v. Davis*, 533 U.S. 678, 692 (2001) (“This Court has suggested . . . that the Constitution may well preclude granting an administrative body the unreviewable authority to make determinations implicating fundamental rights”) (citing *St. Cyr*, 533 U.S. 289 (2001)). For an interesting discussion of how Article I courts may implicate jurisdiction-stripping, see Pfander, *supra* note 13.

108. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (suggesting that Court would defer to President on issues occurring within a “theater of war”); CHEMERINSKY, *supra* note 7, at 49 et seq. (discussing justiciability doctrines—including standing requirement, ripeness and mootness doctrines, prohibition on advisory opinions, and political question doctrine—as limits on federal jurisdiction); *id.* at 180 et seq. (discussing sovereign immunity as a limit on federal jurisdiction); see also HART & WECHSLER, *supra* note 10, at 347–351 (suggesting that political question doctrine, sovereign immunity, and limits on remedies, may effectively preclude review in certain types of cases); Fallon, *supra* note 13, at 329–39, 366–72 (dis-

these doctrines precluding judicial review in constitutional cases, and even seemed to endorse one of those doctrines (the “theater of war” doctrine).¹⁰⁹

Boumediene’s apparent comfort with the preclusion of jurisdiction in certain constitutional cases seems to hinge on who is doing the precluding. Doctrines such as justiciability, immunity, and the theater-of-war doctrine were created, or at least endorsed, by the judiciary.¹¹⁰ More importantly, the boundaries of these doctrines are defined by the judiciary. Thus, what seems to distinguish acceptable jurisdiction-limiting doctrines (such as justiciability, immunity, or the theater-of-war doctrine) from unacceptable jurisdiction-stripping is whether the doctrine—and more importantly, the limit of the doctrine—is defined by the judiciary. Put differently, *Boumediene* may stand less for the proposition that a court must always be available to hear constitutional cases, and more for the proposition that the judiciary—not Congress—gets to say when a court need not be available to hear such cases.

This distinction can be understood in terms of *Boumediene*’s three principles. The idea that there may be areas in which courts need not decide constitutional cases represents an implicit understanding that there are, in fact, exceptions to *Boumediene*’s first two principles (the external review principle and the judicial enforcement principle). That is, in some cases, the Constitution may well give the political branches the last word on constitutional issues. Yet—and this is the key—*Boumediene*’s third (anti-manipulation) principle determines who gets to define those exceptions: the judiciary, not the political branches.¹¹¹

The importance of *Boumediene*’s anti-manipulation principle may suggest a third potential limit on my argument: Congress might be free to strip jurisdiction—even in constitutional

cussing well-accepted limits on judicial review). For an interesting discussion of whether a Congressional attempt to suspend the writ would present a political question (and concluding it would not), see Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333 (2006); see also *id.* at 334 (noting that three sitting Justices have suggested that such a statute would present a political question).

109. See *Boumediene*, at 2261–62 (appearing to endorse “theater of war” doctrine).

110. I include the caveat because one could see the immunity or the theater-of-war doctrines as originating in the executive branch, as opposed to the Court. My point, however, is that irrespective of where the idea originated, the Court has endorsed the doctrine, and more importantly defines its boundaries.

111. Arguably, *Boumediene*’s anti-manipulation principle would permit Congress (as well as the judiciary) to define the limits of judicial review, so long as Congress did not do so based upon an intent to manipulate. This possibility will be discussed in the text below.

cases—so long as it does not do so as a form of manipulation. To the extent that *Boumediene*'s anti-manipulation principle is critical to my argument against jurisdiction-stripping (a condition that certainly seems to be implicated by my discussion above, distinguishing acceptable jurisdiction-limiting doctrines from unacceptable jurisdiction-stripping), this might suggest that Congress would be free to strip jurisdiction if it did so without violating the anti-manipulation principle. This fact, in turn, begs the question of the meaning of "manipulation" in *Boumediene*'s anti-manipulation principle.¹¹² There would seem to be two basic options for defining "manipulation," one narrow and the other one broad.

A narrow definition of manipulation might include an intent element, with a restrictive concept of intent. Using this definition, Congress would only violate the anti-manipulation principle if it intended to use jurisdiction-stripping as a means to expand the constitutional prerogatives of the political branches.¹¹³ Congressional action based on this type of intent would certainly be troubling from a separation of powers point of view. It would represent a conscious attempt by Congress to remove itself or the President from constitutional supervision by the judiciary. And this narrow definition of manipulation would almost certainly sweep in—and render unconstitutional—some of the more egregious jurisdiction-stripping bills that have been proposed, such as those to bar judicial review in cases involving Congressionally disfavored rights, such as cases dealing with abortion or flag burning.¹¹⁴

However, this narrow definition of "manipulation" would permit jurisdiction-stripping laws which had the effect of precluding judicial review in constitutional cases (and thus, of expanding the constitutional prerogatives of the political branches) so long as that was not Congress's intent; that is, so long as Congress had some other intent, such as promoting administrative efficiency or convenience. In other words, under this definition, Congress would be free to engage in jurisdiction-stripping—even

112. The word "manipulation" is used by the Court in *Boumediene*, but with little explanation or definition. See *Boumediene*, 128 S. Ct. at 2259.

113. It is possible, I suppose, to define intent as nothing more than a desire to restrict jurisdiction. But that seems tautological, or at least meaningless. Presumably any statute restricting jurisdiction is based on intent to restrict jurisdiction. So a better conception of intent would seem to focus on intent to expand the constitutional prerogatives of the political branches.

114. See *supra* notes 8–9; see also note 41 (noting professors who believe that jurisdiction-stripping is constitutionally problematic when it favors certain rights over others).

in constitutional cases—so long as it did so without (or so long as no one could prove) an intent to expand the constitutional prerogatives of the political branches.

This narrow definition seems problematic for at least four reasons. First, this definition would create a strange incentive for Congress to pass numerous, broad jurisdiction-stripping statutes that might just happen to shield Congress or the President from judicial review in certain constitutional cases. Additionally, such a narrow definition would seem to be at odds with the fact that some of the Court's strongest warnings regarding the problems with stripping jurisdiction over constitutional claims are contained in cases where there was no hint of Congressional intent to expand the political branches' constitutional prerogatives; these warnings occurred in cases involving nothing more than preclusion of review of routine administrative law actions.¹¹⁵ Moreover, the fact that this narrow definition is based on Congressional intent places it at odds with the Court's famous statement in *Ex Parte McCordle* that Congressional intent is irrelevant in jurisdiction-stripping cases.¹¹⁶ Finally, intent-based standards are notoriously difficult to prove, especially when dealing with legislative bodies.¹¹⁷

115. See *supra* notes 48–52, and accompanying text.

116. See 74 U.S. (7 Wall.) 506, 515 (1869). To the extent that the Court were to adopt a narrow, intent-based definition of manipulation, the inconsistency with *McCordle* might be explained in one of two ways. First, one might argue that the anti-intent language of *McCordle* was dicta. That is, the Court in *McCordle* may have been unconcerned with Congress's intent because Congress did not in fact foreclose all routes to the appellate jurisdiction of the Court. *Id.* at 515. Second, one might argue that it is far from clear that this aspect of *McCordle* is still good law. *McCordle* may be seen as the product of a bygone era in which the Court generally declined, or at least hesitated, to attempt to discern legislative intent—an era that arguably lasted until the early 1970s. See *Palmer v. Thompson*, 403 U.S. 217, 224 (1971) (discussing pitfalls of court trying to discern legislative intent); *United States v. O'Brien*, 391 U.S. 367, 383 (1968) (explaining the risks of trying to perceive legislative intent); *Fletcher v. Peck*, 6 Cranch 87, 136 (1810) (elaborating on the difficulties of attempting to discover the legislative intent behind a statute). However, in later years, the Court has been far less concerned with such issues and regularly assesses legislative intent. See, e.g., *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (assessing legislative intent); see also *Washington v. Davis*, 426 U.S. 229 (1976) (requiring proof of legislative intent in Equal Protection claims). In this respect, one might read *McCordle*'s hesitance to address legislative intent as having been overruled prior to *Boumediene*. But to the extent that (1) *McCordle* can be read as reflecting non-concern with legislative intent, and (2) this non-concern survived the Court's post-1970s focus on intent, *Boumediene*'s third, anti-manipulation principle—and the limitation that principle imposes on that case's jurisdiction-stripping prohibition—must be understood as a repudiation of this aspect of *McCordle*.

117. See Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 S. CT. REV. 95; Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489 (2006).

A better definition of “manipulation” for purposes of *Boumediene*’s anti-manipulation principle, is a broader one based on effect, rather than intent: Congress should be seen as manipulating jurisdiction in violation of this principle any time it passes jurisdiction-stripping legislation which has the effect of expanding the political branches’ constitutional prerogatives—irrespective of whether Congress intended this effect. This definition avoids the four problems with the narrower definition. It avoids incentives to pass sweeping, non-specific jurisdiction-limiting legislation; is consistent with the Court’s dicta in cases that do not seem to involve any intent to expand political branch prerogatives; does not run afoul of *McCardle*; and does not involve a problematic search for legislative intent.

Thus, *Boumediene*’s anti-manipulation principle is best understood as being implicated any time that Congress passes a law that has the effect of precluding judicial review in a constitutional case, thereby expanding the constitutional prerogatives of the political branches—irrespective of whether this was Congress’s intent. For this reason, I do not believe that my argument is limited to cases in which someone can prove Congressional intent to expand its power or the President’s power. But if the Court were to adopt the narrower definition of manipulation, my argument may well be limited to such cases.

In summary, we can derive from *Boumediene*’s three principles the following rule regarding complete jurisdiction-stripping: Congress cannot strip all jurisdiction over constitutional claims. In such cases, Congress must leave in place some court capable of providing a meaningful check on the political branches. And while the judiciary may abstain from hearing such cases through doctrines such as justiciability, immunity, and the theater-of-war doctrine, the judiciary—not Congress—must determine the boundaries of any doctrine that would preclude jurisdiction in constitutional cases.

2. Lower Federal Courts and Fact-finding.

We have seen how the three separation of powers principles deployed by *Boumediene* to address the territorial scope of the Suspension Clause suggest a significant limit on Congress’s power to preclude all federal jurisdiction. In this Section, I will show how a fourth principle articulated in *Boumediene* suggests a significant limit on Congress’s power to preclude lower court juris-

diction. Specifically, this principle suggests that, at least in some cases, a lower court must be left open for fact-finding.

In the context of discussing the requirements of an adequate substitute for habeas, *Boumediene* compared the procedures available under the DTA with those available under the basic habeas statute, 28 U.S.C. Section 2241. In this comparison, *Boumediene* found particularly important the fact that Section 2241 “accommodates the *necessity for fact-finding that will arise in some cases* by allowing the appellate judge or Justice to transfer the case to a district court of competent jurisdiction, whose institutional capacity for fact-finding is superior to his or her own.”¹¹⁸

In other words, the Court said, (1) in some cases, fact-finding will be necessary, and (2) where fact-finding is necessary, some entity with the institutional capacity for fact-finding must remain open. This principle leaves open the question of which cases require fact-finding, a question I will address below.¹¹⁹ But in such cases, *Boumediene* limits lower court jurisdiction-stripping in one of two important ways.

First, a strong reading of *Boumediene*’s factfinder requirement might suggest that a lower federal court must be left open for fact-finding in such cases. *Boumediene* did specifically refer to “a district court.”¹²⁰ Moreover, as our federal courts are currently structured, federal district courts are designed to serve as the trial courts; the courts that are institutionally designed to find facts. This role would seem to make federal district courts the most obvious entities to satisfy *Boumediene*’s factfinder requirement. Thus, one could argue, *Boumediene* stands for the proposition that, at least in certain types of cases, Congress must leave open a particular type of court—a federal district court—to find facts.

However, this is probably an over-reading of *Boumediene*. A second, weaker, reading of *Boumediene* seems more plausible: *Boumediene*’s factfinder requirement precludes Congress from closing down all lower federal courts unless a competent factfinder remains available. But the Court might well accept someone other than a lower federal court as a competent factfinder. For example, in at least some types of cases, a state court may be

118. See *Boumediene v. Bush* 128 S. Ct. 2229, 2266 (2008) (emphasis added).

119. See *infra* Section II.C.2.

120. See *Boumediene*, 128 S. Ct. at 2266.

available as a factfinder.¹²¹ Alternatively, in some cases, *Boumediene*'s requirement of a competent factfinder might be satisfied by a federal agency or a non-Article III court.¹²²

This second, weaker, reading would seem to be supported by *Boumediene*'s functionalist approach to the question of competence. In *Boumediene*, the Court did not focus specifically on which entities would be competent to review cases brought by prisoners at Guantanamo. Instead, it focused on the attributes which would qualify an entity to hear such cases: The entity must be "disinterested in the outcome and committed to procedures designed to ensure its own independence."¹²³ In other words, the factfinder must be (1) disinterested, and (2) independent. This set of qualifications would suggest that the factfinder does not necessarily need to be a lower federal court. It might be a state court or even a federal agency, so long as that state court or federal agency were sufficiently disinterested and independent.¹²⁴

In summary, *Boumediene* suggests an important limitation on Congress's widely assumed ability to strip jurisdiction from the lower federal courts: At least in certain types of cases, some entity must be available to perform fact-finding. And while it is not clear that this entity must be a lower federal court, it does need to be disinterested and independent.

121. In *Boumediene*, there was no possibility that a state court could play any role. Ever since *Tarble's Case*, it has been clear that a state court cannot hear a habeas case against the federal government; that is, a state court cannot order the federal government to release a prisoner. See 80 U.S. (13 Wall.) 397 (1871). However, as I will argue below in Section II.C.2, *Boumediene*'s factfinder requirement is not limited to habeas cases. And the possibility of state courts serving as the requisite factfinders in constitutional cases may be viable in cases that do not involve habeas petitions against the federal government. See *supra* text accompanying notes 103–106.

122. See *infra* note 107. It also remains possible that the Supreme Court could serve as a factfinder. However, if the lower federal courts were closed, in the vast majority of cases the Supreme Court's jurisdiction would be limited to appellate jurisdiction, which might serve to limit its legal ability to engage in fact-finding. See U.S. CONST. art. III (dividing Supreme Court jurisdiction between original and appellate jurisdiction).

123. *Boumediene*, 128 S. Ct., at 2269 (discussing attributes of criminal courts that seemed to be lacking in military commissions); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (holding that the due process clause requires, "that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker.").

124. This principle has implications for the distinction between entities that are primarily political and those that are more insulated from the political process. Specifically, an agency that is more independent from the President might be considered competent to act as a factfinder, while one that is less independent might not. See *Bowshar v. Synar*, 478 U.S. 714, 726 (1986) (discussing, and applauding, the fact that the independent counsel is independent of the executive branch, despite being part of that branch).

3. The Supreme Court's Appellate Jurisdiction

The Court in *Boumediene* does not say anything directly about Congress's ability to strip the Court's appellate jurisdiction pursuant to the Exceptions Clause. However, *Boumediene*'s actions in this regard arguably speak louder than words, and may be understood as supporting the idea that Congress cannot preclude all routes to the Supreme Court's appellate jurisdiction.¹²⁵

There is little ambiguity about *Boumediene*'s actions. In this case, Congress unequivocally sought to bar the Court's appellate jurisdiction. The MCA provides, "No court, *justice*, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus" in cases such as *Boumediene*.¹²⁶ The Act also provides that, in non-habeas actions, the only federal court with jurisdiction is the U.S. Court of Appeals for the District of Columbia.¹²⁷ In other words, Congress made clear that the U.S. Supreme Court had no business hearing habeas cases or any other cases regarding Guantanamo detainees designated as enemy combatants. Yet the Supreme Court did not hesitate to take the case. Effectively, it acted as if Congress could not preclude the Court from taking the case.

Of course, the Court could have heard the *Boumediene* case solely for the purpose of deciding it did not have jurisdiction. But the Court's review was not so limited. Rather, the Court took the case and decided it on the merits—despite being highly aware of the jurisdiction-stripping provisions of the MCA. This action suggests that the Court effectively rejected those provisions insofar as they might have precluded its own appellate review.

The Court did not discuss this issue. So we do not know the basis for its action. However, the Court's action is consistent with strong dicta in cases going back nearly 140 years suggesting that, in exercising its Exceptions Clause power, Congress must leave open some route to Supreme Court review, at least certain cases. For example, in *Ex Parte McCordle*, the Court upheld an act by Congress that stripped the Court of appellate jurisdiction, but included a paragraph at the end of the opinion pointing out that another statutory route to the Court's appellate jurisdiction

125. Section II.C.3. below, will discuss the types of cases to which this rule applies.

126. See 28 U.S.C. § 2241(e)(1) (2006) (emphasis added).

127. See *id.* § 2241(e)(2), incorporating Detainee Treatment Act §§ 1005(e)(2) and (3), 10 U.S.C. § 801 (granting exclusive jurisdiction for judicial review to D.C. Circuit in non-habeas cases).

remained available.¹²⁸ The implication was that the outcome might have been different had some alternative route not been left open. And in *Felker v. Turpin*, the Court reiterated this suggestion in stronger terms. There, in upholding the 1996 Antiterrorism and Effective Death Penalty Act, the Court emphasized that (1) the statute did not preclude all access to the Supreme Court, and (2) the availability of such access obviated constitutional issues that might have otherwise plagued the statute.¹²⁹ Justice Souter, along with two other Justices, expressly noted that "if it should later turn out that [other] statutory avenues . . . were closed, the question whether the statute exceeded Congress's Exceptions Clause power would be open."¹³⁰

In those cases, the Court essentially warned Congress that precluding all access to the Supreme Court might well be unconstitutional. Thus, in *Boumediene*, where the Court accepted jurisdiction and decided the case on the merits in the face of a clear desire by Congress to preclude such review, it seems reasonable to suppose that the Court's action may have been based on the rationale expressed in its earlier dicta: That Congress cannot exercise its Exceptions Clause power in a way that would close all avenues to the Court. Accordingly, *Boumediene* can plausibly be read as requiring that Congress leave open some route to the Court's appellate jurisdiction.

C. THE UNIVERSALITY OF *BOUMEDIENE*: IT IS NOT JUST A HABEAS CASE

The most obvious objection to the argument I have made is that, whatever principles *Boumediene* may have articulated or relied upon, such principles might be limited to habeas cases. After all, *Boumediene* was a habeas case; a case challenging bodily detention.¹³¹ And the ostensible basis for the Court's decision in *Boumediene* was the Suspension Clause—which applies only to habeas cases.¹³²

128. See *Ex Parte McCordle*, 74 U.S. (7 Wall.) 506, 515 (1869).

129. See *Felker v. Turpin*, 518 U.S. 651, 661 (1996).

130. See *id.* at 667 (Souter, J., concurring).

131. See *Boumediene*, 128 S. Ct. 2240; see also HART & WECHSLER, *supra* note 10, at 352

The historic office [of habeas] is to test the lawfulness of bodily detentions. . . . In modern practice, habeas corpus is frequently employed as a mode of reviewing criminal convictions obtained in courts. Historically, however, an even more fundamental role was to authorize judicial oversight of detentions imposed extra-judicially by executive officials.

132. See *Boumediene*, 128 S. Ct. at 2240; see also U.S. CONST. art. I, § 9, cl. 2 (provid-

It this were true, if *Boumediene*'s answers to the jurisdiction-stripping debate were limited to habeas cases, these answers would still be significant. If that were the case, we would at least have important guidance about the limits of Congress's jurisdiction-stripping powers in habeas cases. But there is reason to believe that at least some, and perhaps all, of *Boumediene*'s answers extend well beyond habeas cases. The principles underlying those answers appear to apply to all constitutional claims.

1. Stripping All Federal Jurisdiction: *Boumediene* Applies to All Constitutional Claims.

My claim regarding the significance of *Boumediene* is strongest with respect to its implications for the general jurisdiction-stripping question: the idea that, in exercising its jurisdiction-stripping powers, Congress must leave in place some federal court to hear constitutional claims.¹³³ This principle almost certainly extends beyond habeas cases. Rather, it applies to all constitutional claims, irrespective of whether they involve detention. This scope is apparent from three aspects of the Court's opinion.

First, the *Boumediene* Court made clear that it saw habeas as a means, not an end. The protection of constitutional rights was the end. The Court stated, "[T]he writ of habeas corpus is an indispensable mechanism for monitoring the separation of powers."¹³⁴ Elsewhere, the Court spoke of the compelling need to adhere to "freedom's first principles," and highlighted two such principles: One was "freedom from arbitrary and unlawful restraint"—that is, habeas. The other was "the personal liberty that is secured by adherence to the separation of powers."¹³⁵ In other words, the majority in *Boumediene* understood the case not just as a habeas case, but also more broadly as a separation of powers case.

ing the text of the Suspension Clause); *INS v. St. Cyr*, 533 U.S. 289 (2001) (holding that Suspension Clause limits Congress's power to preclude habeas review).

133. As noted above, there is some question as to whether, in some non-habeas cases, a state court might suffice. See *supra* text accompanying notes 105–107. However, for purposes of this Section, I will refer to *Boumediene*'s principle as requiring a federal court in constitutional cases.

134. See *Boumediene*, 128 S. Ct. at 2259. Professor Tyler makes a similar argument regarding habeas as a means to another end: that habeas serves to ensure due process. See Tyler, *supra* note 108, at 337.

135. See *Boumediene*, 128 S. Ct. at 2277. The Court also mentioned the importance of separation of powers principle at *id.* at 2263 (noting that the "gravity of the separation-of-powers issues raised by these cases" was "exceptional").

In fact, the Court was explicit as to the way it saw the relationship between habeas and the separation of powers principles it articulated. Immediately after articulating its three separation of powers principles, the Court noted, "These concerns have particular bearing on the Suspension Clause question"¹³⁶ In other words, the Court expressly saw the need for habeas as an example—a subset—of its broader concerns about separation of powers.

Second, the three separation of powers principles that served as the foundation for the *Boumediene* Court's opinion apply not just to habeas cases; they apply to all constitutional claims. The core principle that animated *Boumediene* was the Court's assertion that judicial review is required to keep the political branches within the bounds of the Constitution. The Court's fear was that, by strategically locating operations in places such as Guantanamo that would arguably permit evasion of judicial review, the political branches could effectively transgress the Constitution as they pleased—that they could "switch the Constitution on or off at will."¹³⁷ Yet this fear cannot be limited to habeas cases, or cases in which someone is in custody. The concern that, absent judicial review, the political branches could transgress the Constitution at will applies to any of the myriad ways in which the political branches can transgress the constitution even when no one is in custody.¹³⁸

For example, suppose that the government fined people who refused to recite the Pledge of Allegiance, or barred them from voting. And suppose that the government could preclude judicial review of such fines or disenfranchisement. There would be no custody, and thus no habeas claims. Yet this would be exactly the type of unlimited power—the same ability to transgress the Constitution with impunity—that the *Boumediene* Court feared. The principle applies not just to habeas cases; it applies to all constitutional claims.¹³⁹

136. *See id.* at 2259.

137. *See id.*

138. Of course, in cases where someone *is* in custody, the availability of habeas may serve to address this concern. *See INS v. St. Cyr*, 533 U.S. 289, 299 (2001) (distinguishing between judicial review and habeas and noting that leaving habeas intact avoided constitutional problem). My point is that even in cases where habeas is not required, *Boumediene*'s separation of powers principle require judicial review.

139. *See* Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2573 (1998) (explaining that the checking-the-political-branches argument requires judicial review in non-habeas, as well as habeas cases).

Third, the *Boumediene* Court's selection of authority suggests that its principle applies in non-habeas cases. The claim that judicial review is necessary to keep the political branches within the bounds of the Constitution comes straight out of *Marbury v. Madison*.¹⁴⁰ And *Boumediene* clearly relied on that case, citing it directly for the proposition that the Court (as opposed to the political branches) must have the ability "to say what the law is."¹⁴¹ Yet *Marbury* was not a habeas case. *Marbury* established the courts' right to find that any type of action by the political branches violates the Constitution. That is, *Marbury* applied to all constitutional claims. And *Boumediene*'s conscious embrace of *Marbury* suggests that its reasoning applies to all constitutional claims.

These three arguments strongly suggest that *Boumediene*'s answer to the general jurisdiction-stripping question—that Congress cannot preclude all federal jurisdiction—extends beyond habeas cases. Rather, this principle extends to all constitutional claims.¹⁴²

2. The Need for a Factfinder: *Boumediene* Applies to all Constitutional Claims.

Boumediene's suggestion that Congress cannot preclude all lower federal court jurisdiction unless a disinterested and independent factfinder remains available appears similar in scope: This principle appears to apply to all constitutional claims, or at least those constitutional claims that are fact-specific.

One can, of course, argue that this principle is limited to habeas cases. After all, *Boumediene* was a habeas case. And *Boumediene*'s discussion of the need for fact-finding occurred in the context of a discussion about habeas substitutes.¹⁴³

However, the better view is that the principle applies to all constitutional claims. As discussed in the prior Section, *Boumediene* was concerned about protecting constitutional rights more

140. 5 U.S. (1 Cranch) 137 (1803).

141. See *Boumediene*, 128 S. Ct. at 2259 (citing *Marbury*, 5 U.S. (1 Cranch) at 177).

142. Professor Claus offers another argument against limiting any jurisdiction-stripping argument to habeas cases: He argues that the primary textual limit on jurisdiction-stripping comes from Article III's vesting clause; that the Suspension Clause presupposes the existence of jurisdiction, rather than itself requiring such jurisdiction. See Claus, *supra* note 13, at 109–12. However, *Boumediene* appears to be based on separation of powers principles, as opposed to the textualist principle set forth by Professor Claus.

143. See *Boumediene*, 128 S. Ct. at 2266.

generally—not just in habeas cases or cases involving detention.¹⁴⁴ And in many constitutional cases, factfinding is essential. Without adequate fact-finding, there can be no adequate constitutional review.

Consider a simple example of the fact-dependency of constitutional litigation. Suppose that Congress passed a statute precluding any judicial review of facts in free speech cases. And suppose that a speaker gave an anti-government speech. And finally, suppose that the government took the position that the speech was “incitement” (which is largely unprotected by the first amendment), and therefore sought to impose a large fine on the speaker. If the speaker defended on first amendment grounds, the case would largely turn on a factual determination: whether the speech was in fact “incitement”; that is, whether it was intended and likely to cause the audience imminently to violate the law.¹⁴⁵ Yet, as a result of the statute precluding review of facts, the court could not engage in meaningful review. It would be bound to accept the government’s factual contention that the speech was “incitement.” Effectively, the government could suppress speech without judicial review.¹⁴⁶

As discussed above, *Boumediene* seemed concerned with protecting constitutional rights, irrespective of whether the failure to do so results in detention.¹⁴⁷ It therefore seems likely that the *Boumediene* Court would require the availability of a factfinder not just in habeas or detention cases, but in all constitutional cases.

3. The Need for Supreme Court Appellate Review: The Unclear Scope of *Boumediene*

The scope of *Boumediene*’s implicit holding that Congress cannot foreclose all routes to the Supreme Court’s appellate jurisdiction is less clear. This is in large part because we do not really know the Court’s justification for this holding.

The separation of powers principles that underlie *Boumediene*’s suggested limits on complete jurisdiction-stripping do not

144. See *supra* Section II.C.1.

145. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding “incitement” not protected and defining that term).

146. This idea, that factfinding may control the outcome of constitutional claims, was recognized by the Court in *Crowell v. Benson*, 285 U.S. 22 (1932) (“[W]herever fundamental rights depend, as not infrequently they do depend, upon facts. . . . finality as to facts becomes in effect finality in law.”).

147. See *supra* Section II.C.1.

apply to the Court's implicit holding that Congress cannot foreclose all avenues for its appellate review. These separation of powers principles require some judicial review. But they do not necessarily require judicial review by the Supreme Court exercising its appellate jurisdiction. Any federal (or possibly state) court should do. Accordingly, the idea that Congress is required to leave open some route to the Supreme Court's appellate jurisdiction must be based on some other argument.

Actually, we do not really know what argument might underlie *Boumediene*'s willingness to ignore Congress's limit on its appellate jurisdiction. As noted above, *Boumediene* did not discuss its reasoning for accepting the appeal and deciding the case on the merits despite the MCA's removal of its appellate jurisdiction.¹⁴⁸ And to the extent that this action was based on dicta from earlier cases, those cases never discussed their reasoning either.¹⁴⁹ Without an understanding of the reasoning for the principle, it is difficult to know its scope.

That is not to say that we have no clues as to the possible scope of *Boumediene*'s implicit threat on stripping the Supreme Court's appellate jurisdiction. There are three clues, two of which suggest a limited scope (that *Boumediene*'s implicit holding regarding Supreme Court appellate jurisdiction is limited to habeas cases), and one of which suggests a broader scope.

First, a reference within the *Boumediene* opinion suggests a limited scope. To understand this reference, it is important to keep in mind that the argument in favor Congress's ability to strip the Supreme Court of its appellate jurisdiction is based on the fact that the Exceptions Clause of Article III gives Congress the power to "regulate" that jurisdiction.¹⁵⁰ The *Boumediene* Court referred to this language only once. And that reference was clearly focused on the writ. Specifically, the Court noted that the Suspension Clause serves as "an 'exception' to the 'power given to Congress to regulate courts.'"¹⁵¹ This suggests that the Court understood the limit on Congress's power to strip its appellate jurisdiction as coming from the Suspension clause—the Constitutional enshrinement of the writ.¹⁵²

148. See *supra* Section II.B.3.

149. See, e.g., *Felker v. Turpin*, 518 U.S. 651 (1996); *Ex Parte McCordle*, 74 U.S. (7 Wall.) 506, 513–14 (1869).

150. See U.S. CONST. art. III, § 2.

151. *Boumediene*, 128 S. Ct. 2229, 2246 (2008).

152. But see Claus, *supra* note 13, at 109–12 (arguing that the writ is enshrined in Article III, not the Suspension Clause).

Second, *Boumediene*'s lineage in this area lies squarely within the realm of habeas. As noted above, *Boumediene* effectively made good on a warning that the Court had provided several times before: That, in exercising its Exceptions Clause power, Congress must leave open some appellate access to the Supreme Court. Notably, each of those earlier warnings occurred in a habeas case.¹⁵³

However, a third argument points the other way: to the need to preserve Supreme Court appellate jurisdiction in cases beyond habeas. This argument has to do with the Court's view of its own necessity. As will be discussed in the following Part, *Boumediene* represents a fairly bold stroke by the Court.¹⁵⁴ In that sense, the Supreme Court is clearly taking a leadership role in proclaiming the importance of federal judicial review in the constitutional structure. Given its leadership role, one might wonder if the Supreme Court would really ever allow itself to be sidelined, with final say over constitutional questions in non-habeas cases given to lower federal courts.¹⁵⁵

But at least for now, *Boumediene* seems to have: (1) unequivocally answered the question of whether Congress can close all routes to the Supreme Court in habeas cases (it cannot), but (2) left open the question of whether it must remain available as a forum in non-habeas cases.

III. *BOUMEDIENE* AS AN ACT OF IMPERIALISM

If all *Boumediene* had done was to provide answers—even partial answers—to the jurisdiction-stripping debate, that would be quite significant. But perhaps what is most significant about *Boumediene* was the Court's willingness to articulate the principles it did, when historically it had been extremely hesitant to do so.

As discussed above, the Court has tended to use a strong avoidance doctrine to avoid squarely facing the question of whether Congress can strip the courts of jurisdiction: Whenever possible (and sometimes even when it seemed impossible), the

153. See *Felker*, 518 U.S. 651; *McCardle*, 74 U.S. 506.

154. See *infra* Part III.

155. See, e.g., Calabresi & Lawson, *supra* note 13, at 1008 (arguing that Supreme Court review is necessary to give meaning to the terms "supreme" and "inferior" in Article III); Claus, *supra* note 13, at 114 (articulating the same textual argument); Pfander, *supra* note 31 (making the same Article III argument). *Boumediene*, however, did not appear to consider this textual argument.

Court has interpreted statutes to find that they did not preclude all jurisdiction—thus avoiding the question of whether Congress could do so.¹⁵⁶

Notably, the Court could have taken a similar approach in *Boumediene*—at least in a number of respects. The statutes in question (the DCA and MCA) actually gave jurisdiction to one federal court (the D.C. Circuit), and also created fact-finding bodies (the military commissions).¹⁵⁷ Notably, in a dissent by Justice Roberts, four of the Justices in *Boumediene* stated that these statutes could be read to provide these two entities with the power to perform all of functions that the majority deemed necessary for them to serve as an adequate substitute for habeas.¹⁵⁸

While the correctness of the dissent's statutory reading may be open for debate, that is not the point. The point is that this statutory reading was at least possible. It was plausible enough to have been adopted by four Justices. And it hardly seems less plausible than readings the Court has given to jurisdiction-stripping statutes in many of its avoidance cases.¹⁵⁹ Such a reading would have allowed the Court to avoid the constitutional question regarding the territorial scope of the Suspension Clause. And while such a reading might have yielded a result that differed formally from the one reached in *Boumediene* (it would not have provided the non-citizen detainees with the right to seek habeas), it would have yielded a similar—arguably indistinguishable—practical result (a statutory process possessing all of the attributes of habeas that the Court saw as essential).

Yet the Court did not choose this path of avoidance. Instead, the *Boumediene* Court read the statutes as precluding the type of process that would have provided an adequate habeas substitute, thereby forcing the constitutional question regarding the scope of the Suspension Clause.¹⁶⁰ And the Court did not stop there. It went on to answer that constitutional question in the most forceful of ways, not merely striking down the DTA and MTA, but doing so based on broad and powerful separation of powers principles—principles suggesting the need for judicial

156. See *supra* Section I.C.; see also Sager, *supra* note 13, at 20 (“[T]he Court, for its part, has generally tried to avoid or soften confrontations with the national legislature.”).

157. See 28 U.S.C. § 2241(e) (2006).

158. *Boumediene*, 128 S. Ct. at 2283–85 (Roberts, J., dissenting).

159. See *supra* Section I.C.

160. See *Boumediene*, 128 S. Ct. at 2270–75.

review to police other branches' compliance with the Constitution.¹⁶¹ In these ways, *Boumediene* was surely a bold decision.

This boldness raises two key questions. First, it raises a descriptive question: Why did the Court choose this case for such a bold act, after resisting the temptation to act in this way in so many earlier cases? Second, it raises a normative question: Is this boldness a good thing? Was *Boumediene* justifiably bold, or was it imperious? Should we be happy with *Boumediene* or frightened by it? While it is beyond the scope of this Article to attempt to provide definitive answers to either of these questions, I will offer a few thoughts on each.

With respect to the descriptive question of why the Court has acted in this way now, I will offer the observation that perhaps it was provoked. On a micro level, the Court may have been provoked by the sheer amount of time that the detainees had been held by the government (some, nearly six years) with what the Court perceived as no meaningful opportunity to challenge their detentions.¹⁶² But, as noted above, the court could have provided the detainees with process in a less bold manner.¹⁶³

More likely, the Court may have been provoked on a macro level. Since the beginning of the war on terror, President Bush had claimed extraordinary—some might say imperious—powers.¹⁶⁴ In response, one might have expected, perhaps hoped,

161. See *supra* Section II.B.

162. See *Boumediene*, 128 U.S. at 2275 (noting that, "In some of these cases six years have elapsed without the judicial oversight that habeas corpus or an adequate substitute demands."); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 520–21 (2004)

It is a clearly established principle of the law of war that detention may last no longer than active hostilities. . . . If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war [permitting detentions for the duration of the conflict], that understanding may unravel. But that is not the situation we face as of this date. Active combat operations against Taliban fighters apparently are ongoing in Afghanistan.

Rasul v. Bush, 542 U.S. 466, 485 (2004) (noting "the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing").

163. See *supra* text following note 159; see also *Boumediene*, 128 S. Ct. at 2293 (Roberts, J., dissenting) (suggesting that Court's ruling might delay rather than expedite detainees' release).

164. See, e.g., CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY (2007); Linda Greenhouse, *Fundamental Questions: The Imperial Presidency and the Constraints of the Law*, N.Y. TIMES, Apr. 18, 2004, at D7; see also JORDAN J. PAUST, BEYOND THE LAW: THE BUSH ADMINISTRATION'S UNLAWFUL RESPONSES IN THE "WAR" ON TERROR (2007) (claiming that President Bush acted criminally in war on terror).

that the Court would step up and try to stop such exercises of an imperial presidency.¹⁶⁵

In this respect, one might even comment on the Court's restraint. The Court certainly had the opportunity to push back against an imperious President in earlier cases, such as *Hamdi* and *Hamdan*. But notably, in its earlier cases in the war on terror, the Court did not push back directly against the President. Instead, the Court looked to Congress to control any excesses of an imperial presidency.¹⁶⁶ For example, in *Hamdi*, the Court invited Congress to create a set of procedures for military tribunals to determine "enemy combatant" status.¹⁶⁷ And in *Hamdan*, the Court invited the President to ask Congress to pass a law authorizing him to use military commissions to try individuals accused of certain types of wrongdoing.¹⁶⁸

The idea seemed like a sound one. If the Court could stand back and let Congress act as a check on an imperial President, the problem might be solved—the imbalance redressed—with no need for the Court to seem imperious.¹⁶⁹ The problem is that, in the climate of the war on terror, Congress seemed only too happy to comply with any request from the President.¹⁷⁰

In fact, the Court might have come to view Congress not as a check on imperious presidential power, but as an enabler of such power. After the Court ruled against the President and held

165. Linda Greenhouse expressed this hope in two articles, one in 2002 and the other in 2004—before the Supreme Court had acted on any of the "war on terror" cases. See Greenhouse, *supra* note 164, at D7; Linda Greenhouse, *War of Secrets: Judicial Restraint: The Imperial Presidency vs. the Imperial Judiciary*, N.Y. TIMES, Sept. 8, 2002 at D3.

166. See William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992) (arguing that the Court uses statutory construction rules to force Congress to consider constitutional issues); Friedman, *supra* note 54, at 670 (describing how Congress may promote dialogue over constitutional issues by prodding Congress to act):

167. See *Hamdi*, at 538.

168. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2799 (Breyer, J., concurring) ("Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.")

169. See HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990) (arguing that the Court should take on the role of promoting discourse between the political branches in foreign/military affairs matters). But see Owen Fiss, *The War Against Terrorism and the Rule of Law*, 26 OXFORD J. LEGAL STUD. 235, 239 (2006) (criticizing Court for refusing to engage core substantive issues in cases regarding the war on terror).

170. It is arguable that Congress has been too eager to cede power to the President even in matters that do not involve war. See *Clinton v. New York*, 524 U.S. 417 (1998) (holding that Congress impermissibly tried to give power to the President to veto specific items in spending bill).

that the general habeas statute permitted review of aliens at Guantanamo,¹⁷¹ Congress passed the Detainee Treatment Act (DTA), precluding such review.¹⁷² And after the Court ruled against the President and held that the DTA was not retroactive (thereby permitting review of claims that were already pending) and that Congress had not authorized trials by military commissions,¹⁷³ Congress passed the Military Commissions Act, precluding pending claims and authorizing trial by military commissions.¹⁷⁴ So it may well have appeared to the *Boumediene* Court that Congress simply was not up to the task of counter-balancing an imperious executive. Thus, the Court may have decided to take that role upon itself.

As to the normative question of whether this is a good thing, this is even harder to say. But here, too, I will offer a few observations, both prudential and structural.

As a prudential matter, the question is whether the Court should have avoided or engaged the constitutional question. The avoidance doctrine makes some sense. It allows the Court to avoid difficult questions, where the Court risks making decisions it may later regret.¹⁷⁵ It might make sense for the Court to try, at least in the first instance, to prod Congress into doing the right thing.¹⁷⁶ Avoidance also allows the Court to take a stance of humility, avoiding grand proclamations of its own power or of Congress's lack of power. The doctrine avoids the possibility of a constitutional stand-off, in which a political branch might refuse to follow an order of the Court (though this possibility seems less likely in modern times).¹⁷⁷ And the doctrine arguably pro-

171. See *Rasul v. Bush*, 542 U.S. 466 (2004).

172. See 28 U.S.C. § 2241(e) (2006).

173. See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

174. See 28 U.S.C. § 2241(e). Although the dissent in *Boumediene* attempts to characterize the MCA as a careful balancing act by Congress, the Act incorporates most of the features of the President's program that were most problematic, including (1) the Commissions can still hear and consider hearsay evidence, (2) the Commissions can still hear and consider evidence extracted through "extended interrogation techniques," so long as that evidence was obtained prior to the DTA, and (3) suspects may still be barred from learning about, and therefore effectively refuting, evidence against them that has been classified as secret. See *id.* The MCA also sought to quash all outstanding habeas petitions. See *id.* In other words, the MCA purported to give to the President most, if not all, of the powers he asserted prior to the passage of that statute.

175. See, e.g., Gordon G. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549 (2000).

176. See Eskridge & Frickey, *supra* note 166 (discussing Court's use of statutory construction rules to force Congress to consider constitutional issues); Friedman, *supra* note 54, at 668–69 (discussing Court's role in facilitating dialogue over constitutional issues).

177. Compare CHEMERINSKY, *supra* 7, at 46 (noting that at time of *Marbury*, the President would almost certainly have disregarded an order of the Court with which he

motes a certain healthy uncertainty. Perhaps it is a good thing for the judiciary to have to worry about jurisdiction-stripping, and for Congress to have to worry about whether it has this power.¹⁷⁸

Of course, there may also be a time for certainty and backbone, rather than uncertainty and forbearance. As discussed above, the Court may have been responding to a sense that the President was out of control and that Congress was not likely to stand up to him. Perhaps this was a time for action, rather than avoidance.

As a structural matter, the general idea of one branch rising to challenge another branch that seems to be accumulating too much power makes some sense. And it is hardly a new idea. It is part of the Framers' design. Notably, more than 200 years ago, soon-to-be-Chief Justice John Marshall expressed the idea in connection with the presidential campaign of 1800. In that campaign, he opposed Thomas Jefferson because he feared that Jefferson would be too close with Congress.¹⁷⁹ In other words, for Marshall, it was critically important for each branch of the government to operate independently. The idea of one acting as a rubber stamp for another, as often seems to happen in the war on terror, would seem problematic—perhaps problematic enough to warrant the third branch in stepping up to serve as a check to the other two.

On the other hand, there are also some potential negatives to the Court stepping in to check an imperious President and compliant Congress. First, it is not clear where or whether this model—imperiousness spawned by imperiousness—ever ends. If one branch repeatedly asserts greater power in response to other branches' assertions, all of the branches may eventually end up incredibly powerful. Of course, it is possible that the existence of powerful branches counteracting powerful branches might render the government as a whole impotent, rather than powerful. But it could also result in a federal government that is, as a

disagreed), with *id.* at 356 (noting President Nixon's compliance with Court's order to comply with subpoena). For a detailed discussion of the concept of constitutional crises, see Jack M. Balkin, *Constitutional Hardball and Constitutional Crises*, 26 QUINNIPAC L. REV. 579 (2008).

178. See HART & WECHSLER, *supra* note 10, at 342 ("[T]he existence of congressional power of unspecified scope [may] contribute to the maintenance of a desirable tension between Court and Congress.").

179. See JAMES F. SIMON, *WHAT KIND OF NATION* 138–172 (2003).

whole, quite powerful, a problematic prospect for those concerned about federal power generally.

Second, the way in which the Court has asserted its power—by proclaiming principles that limit Congress’s ability to stop its own exercise of power—raises the specter of an out-of-control court. Remember the whole justification for the Court’s assertion of its power: Someone must limit the political branches or they will exercise unlimited power. But who will limit the power of the judiciary?¹⁸⁰ One might argue that we need not fear this “least dangerous branch,” which generally needs the help of another branch to implement its will.¹⁸¹ But in opinions like *Boumediene*, the Court hardly looks weak.

On balance, it is difficult to say whether *Boumediene* is a good decision. My personal inclination at this point is positive. There is no doubt that presidential power—or at least claimed presidential power—has expanded with the war on terror.¹⁸² It is far from clear to me that Congress has the stomach to serve as a meaningful check on that power. And the likelihood of Congress serving as a meaningful check is further reduced by the fact that many if not most of the targets of expanded presidential power are members of unpopular minority groups who may not have much influence with Congress.¹⁸³ At times like this, I draw comfort from the idea of a powerful court serving as a check on executive power. But that may be simply because I do not particularly fear out of control judicial power at this point in history.

Put differently, how one reacts to the prospect of a bold court may come down to the question of whom one fears most. Those who fear an out-of-control executive (and fear that a weak Congress will not have the backbone or ability to limit the President) will likely cheer the arrival of an assertive judiciary.¹⁸⁴

180. See *Cary v. Curtis*, 44 U.S. (3 How.) 236 (1845) (“To deny [Congress’s power to control jurisdiction] would be to elevate the judicial over the legislative branch of the government, and to give to the former powers limited by its own discretion merely.”), quoted in Hart, *supra* note 13, at 1366–71.

181. See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

182. See, e.g., Balkin, *supra* note 177, at 583 (“President Bush pushed hard for an increase in presidential power, greater secrecy, and limited accountability for the Executive, arguing that these changes were necessary to fight the global war on terror.”).

183. See Claus, *supra* note 13, at 62 (noting particular danger when jurisdiction-stripping is directed against minorities).

184. See, e.g., Geoffrey S. Corn, *Boumediene v. Bush and the Role of the Courts in the War on Terror: The Intersection of Hyperbole, Military Necessity, and Judicial Review*, 43 *NEW ENG. L. REV.* (forthcoming 2009). In fact, some commentators have criticized the Court for not going far enough; for focusing on issues of its own power as opposed to the rights of those detained. See, e.g., Williams, *supra* note 3, at 1.

On the other hand, those who fear unaccountable and out-of-touch judges micromanaging the war on terror will likely loathe a decision such as *Boumediene*. Pick your evil.

CONCLUSION

Although it was a habeas case, *Boumediene* has a great deal to say about jurisdiction-stripping. The separation of powers principles deployed in that case suggest significant limits on Congress's ability to strip jurisdiction from the federal courts in ways that are not likely limited to habeas cases. And perhaps more importantly, the Court's willingness to answer these questions and deploy these principles, which it has largely avoided for ages, may herald the arrival of a Court whose boldness is either (1) is imperious and frightening, (2) is appropriate to match the imperiousness of the President, or (3) both. It depends on who you fear most.